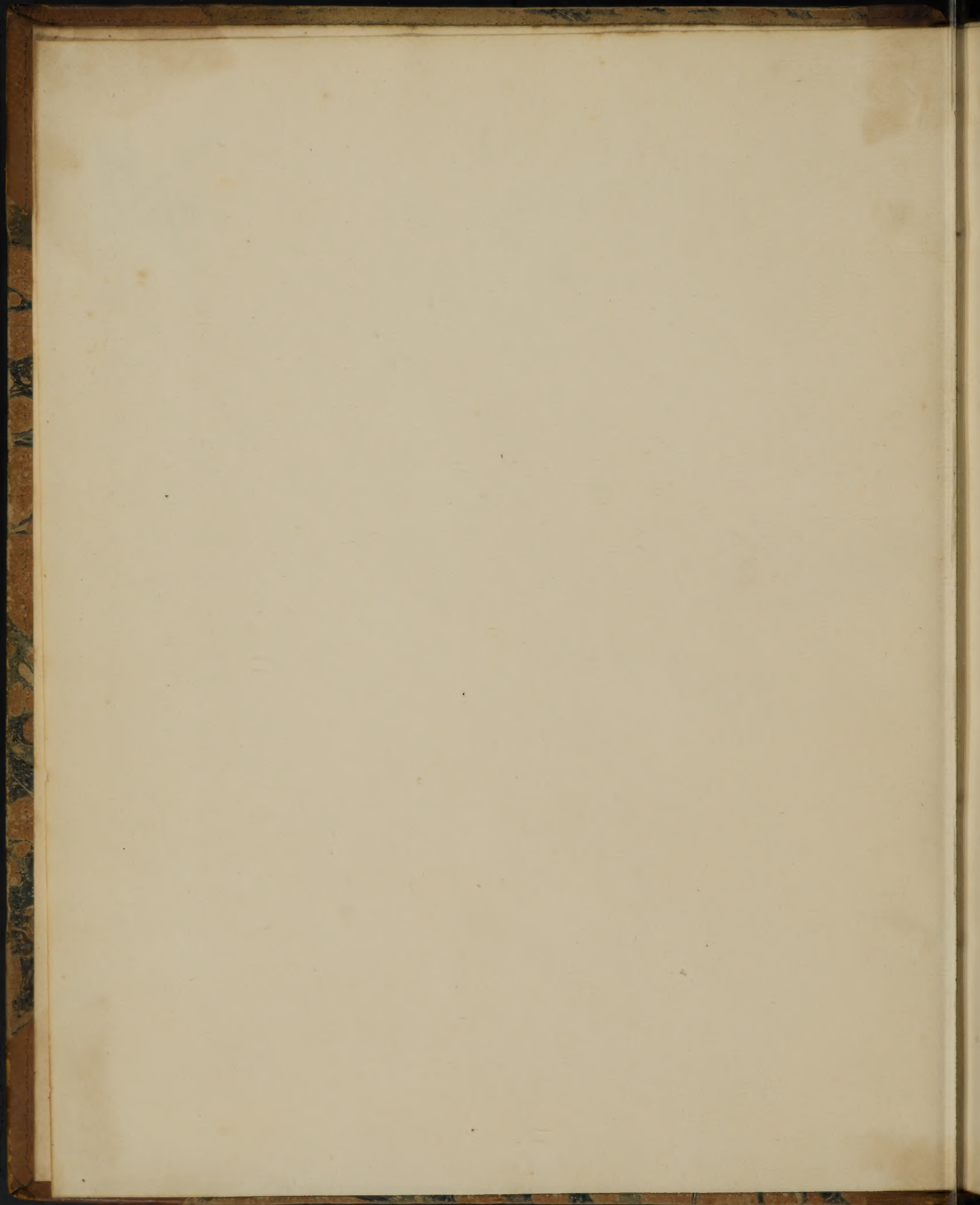
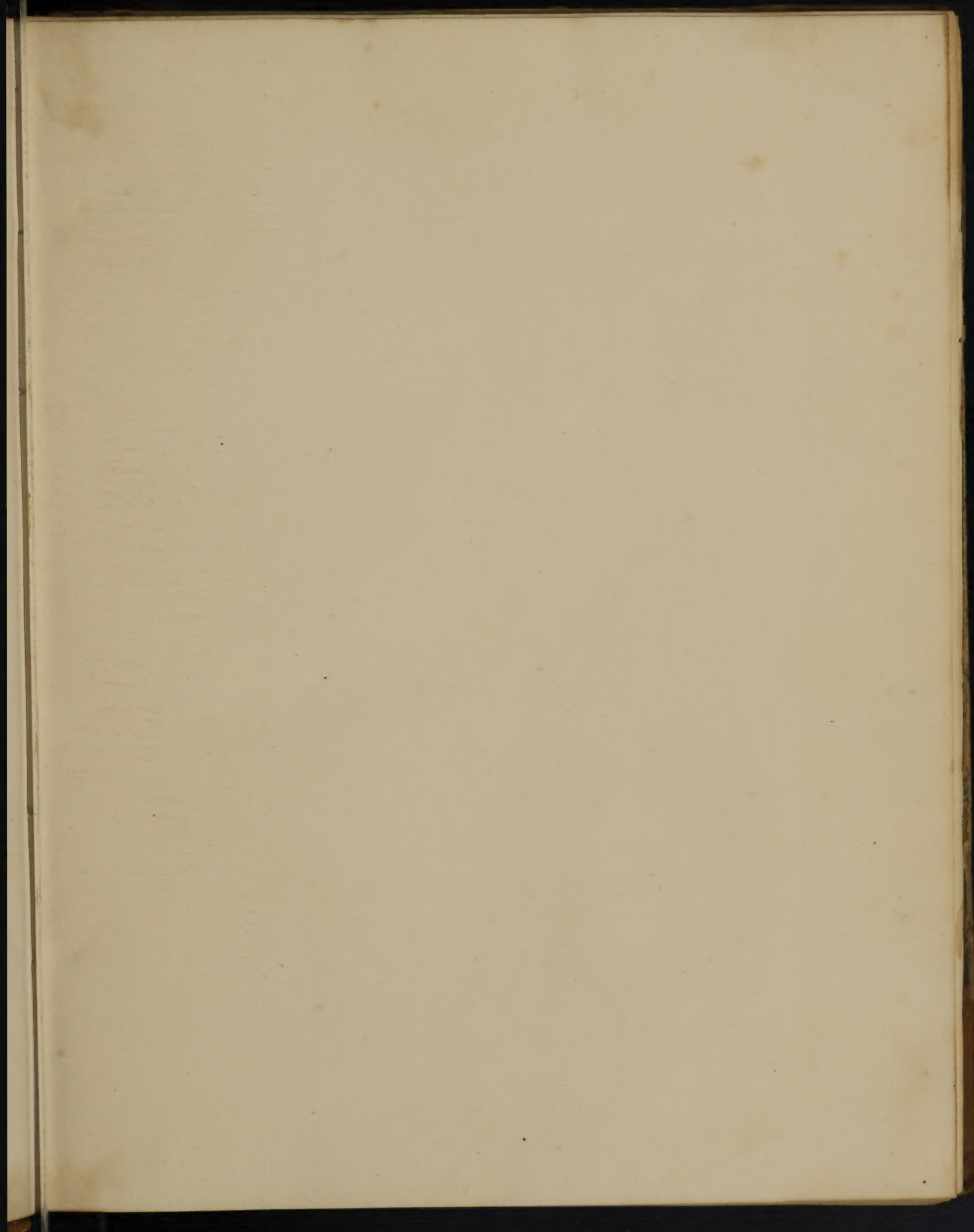
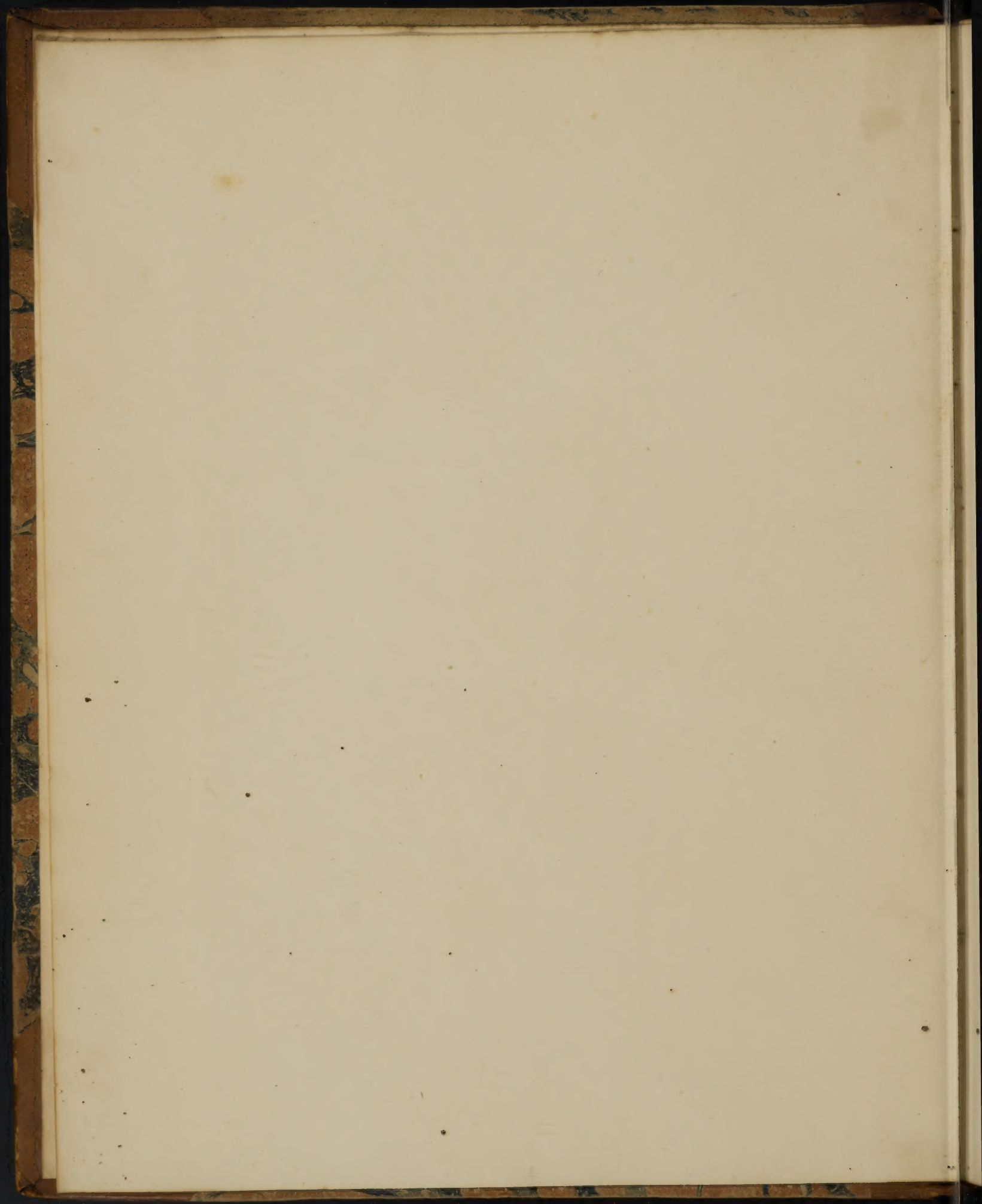


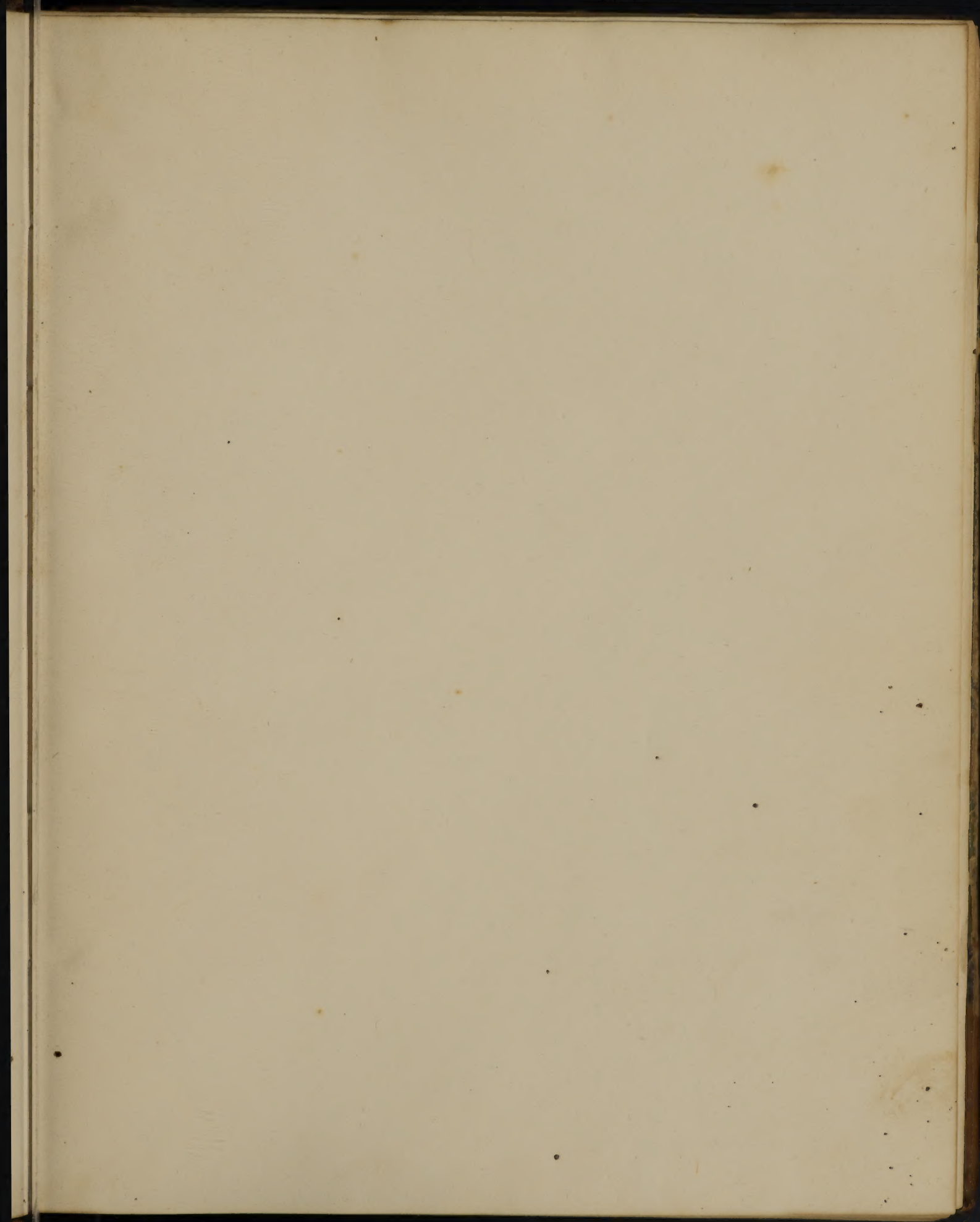
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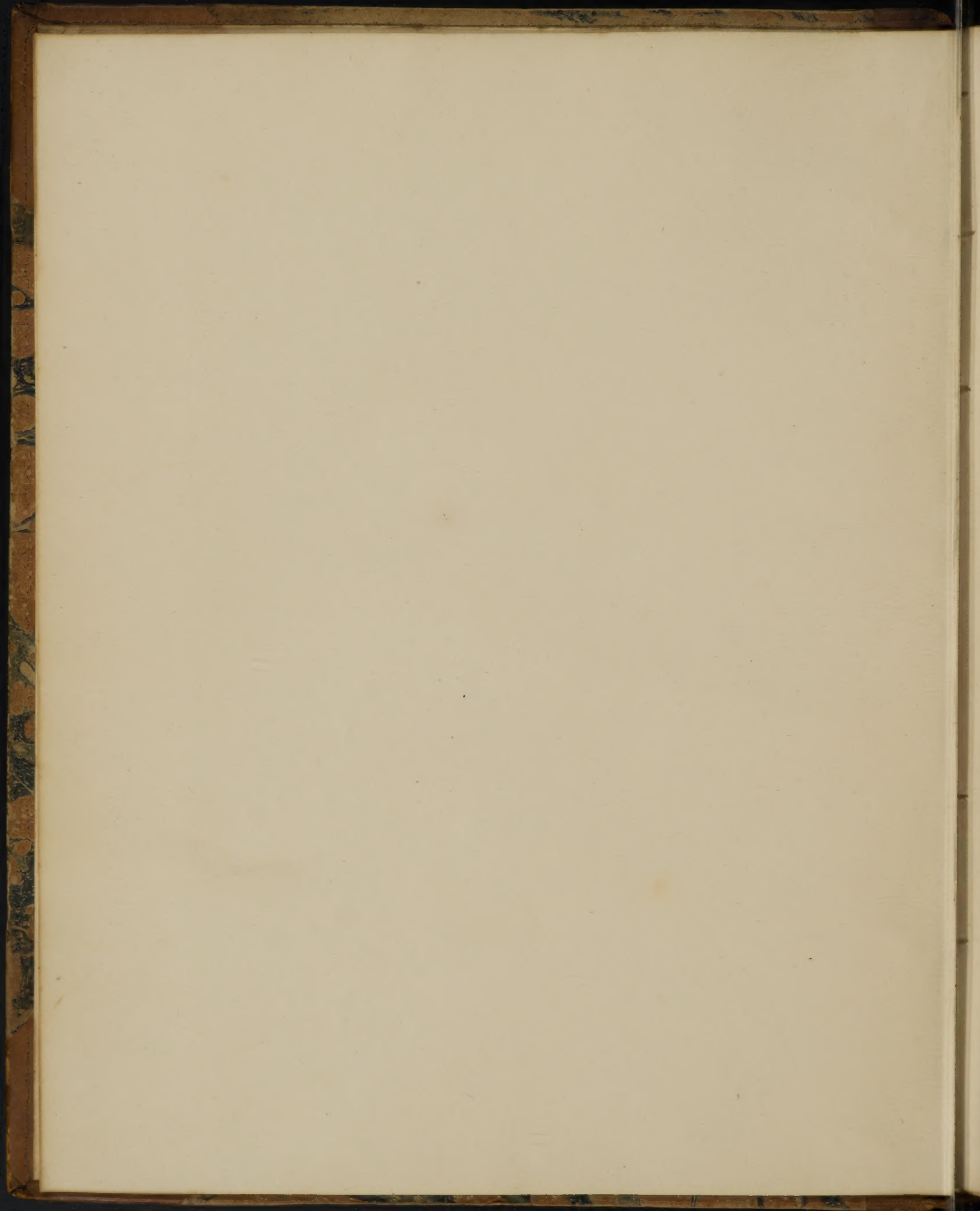
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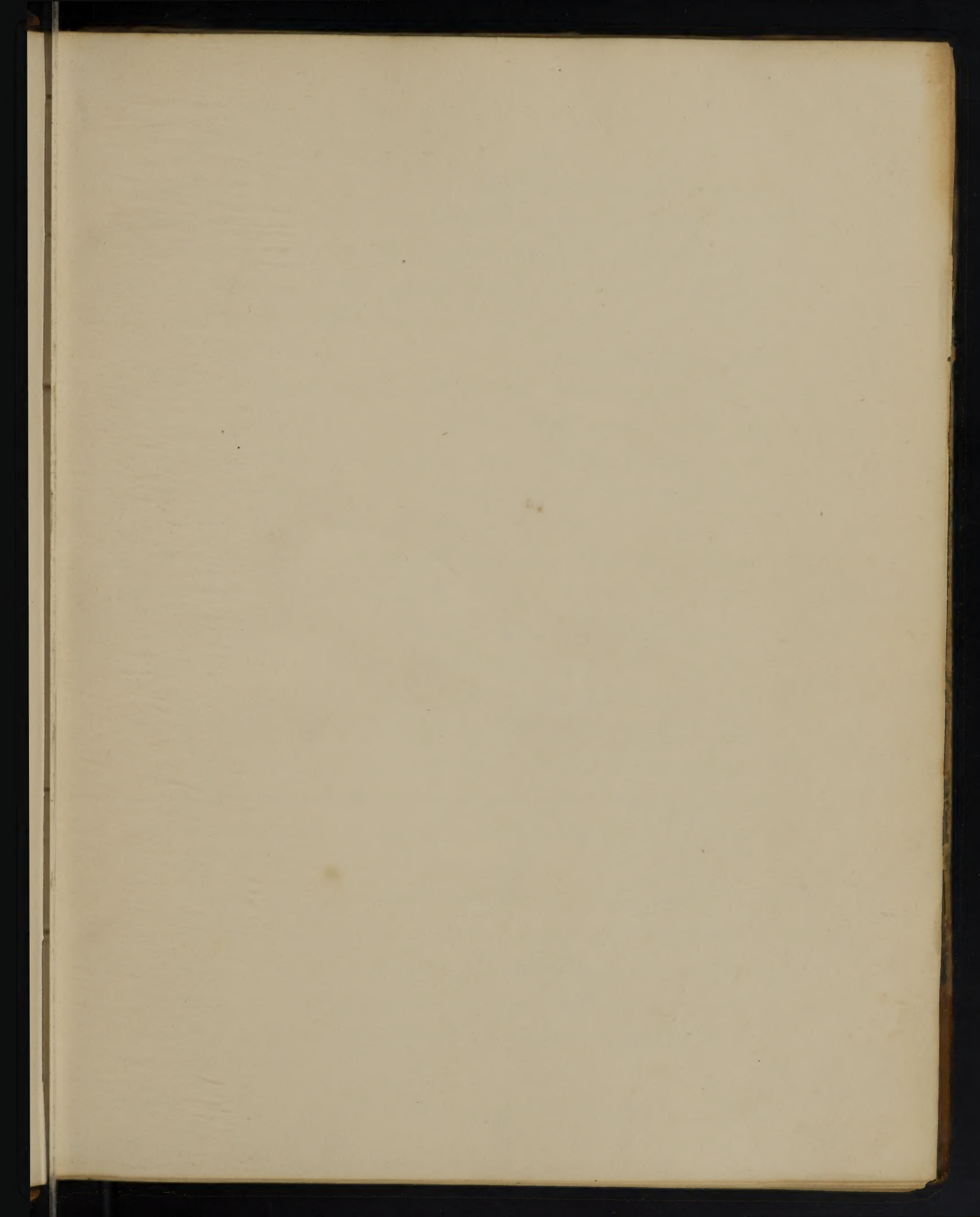


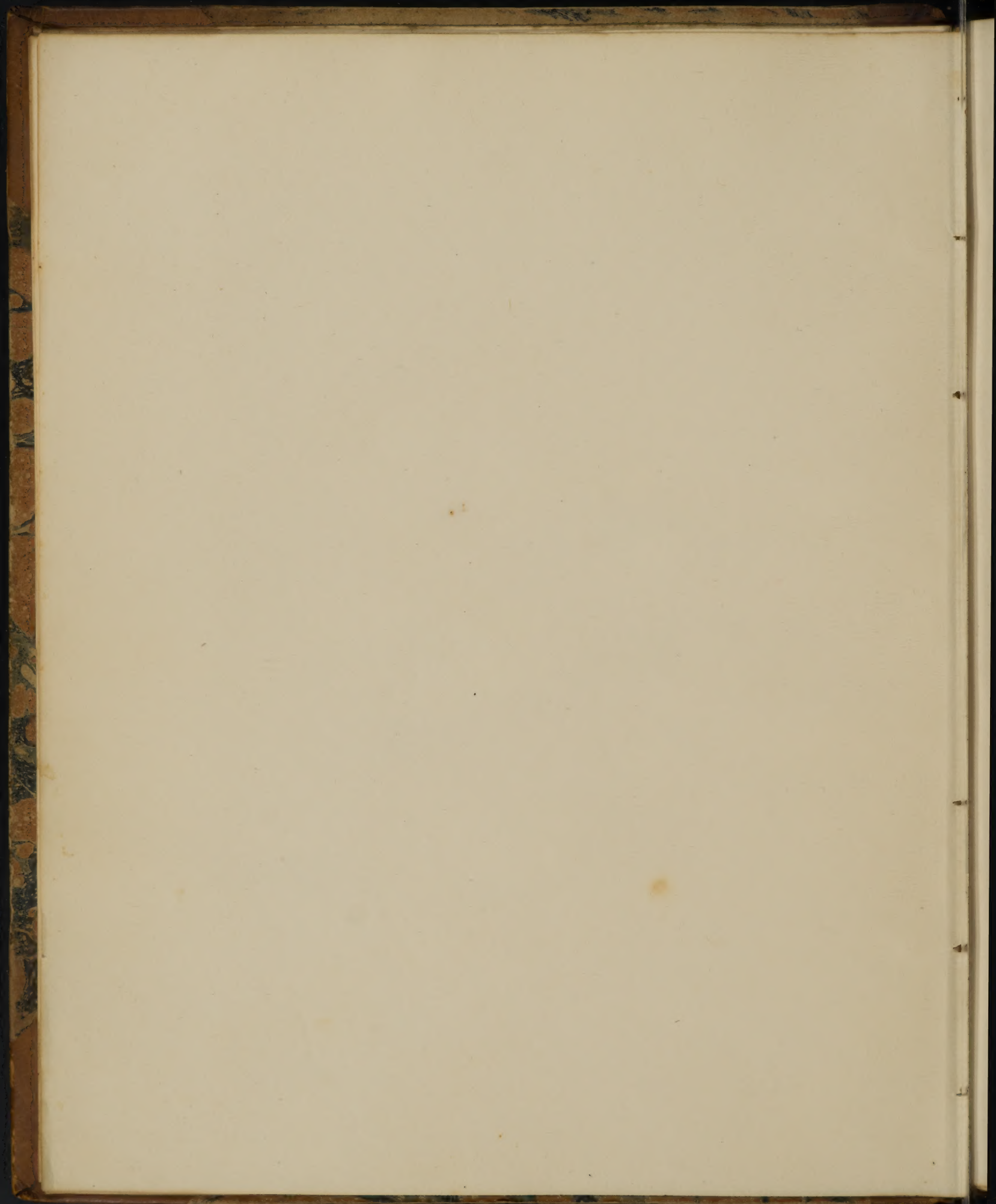


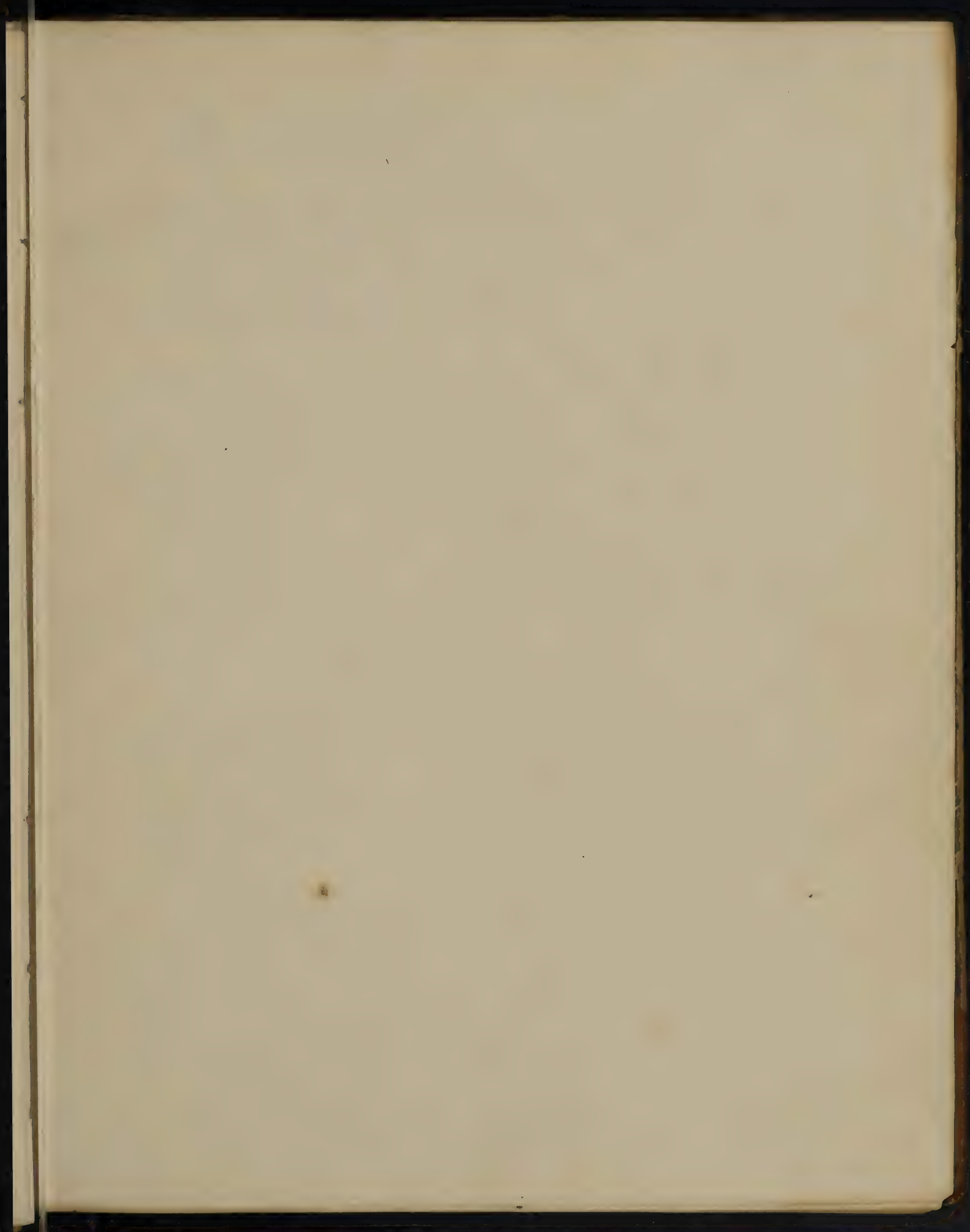


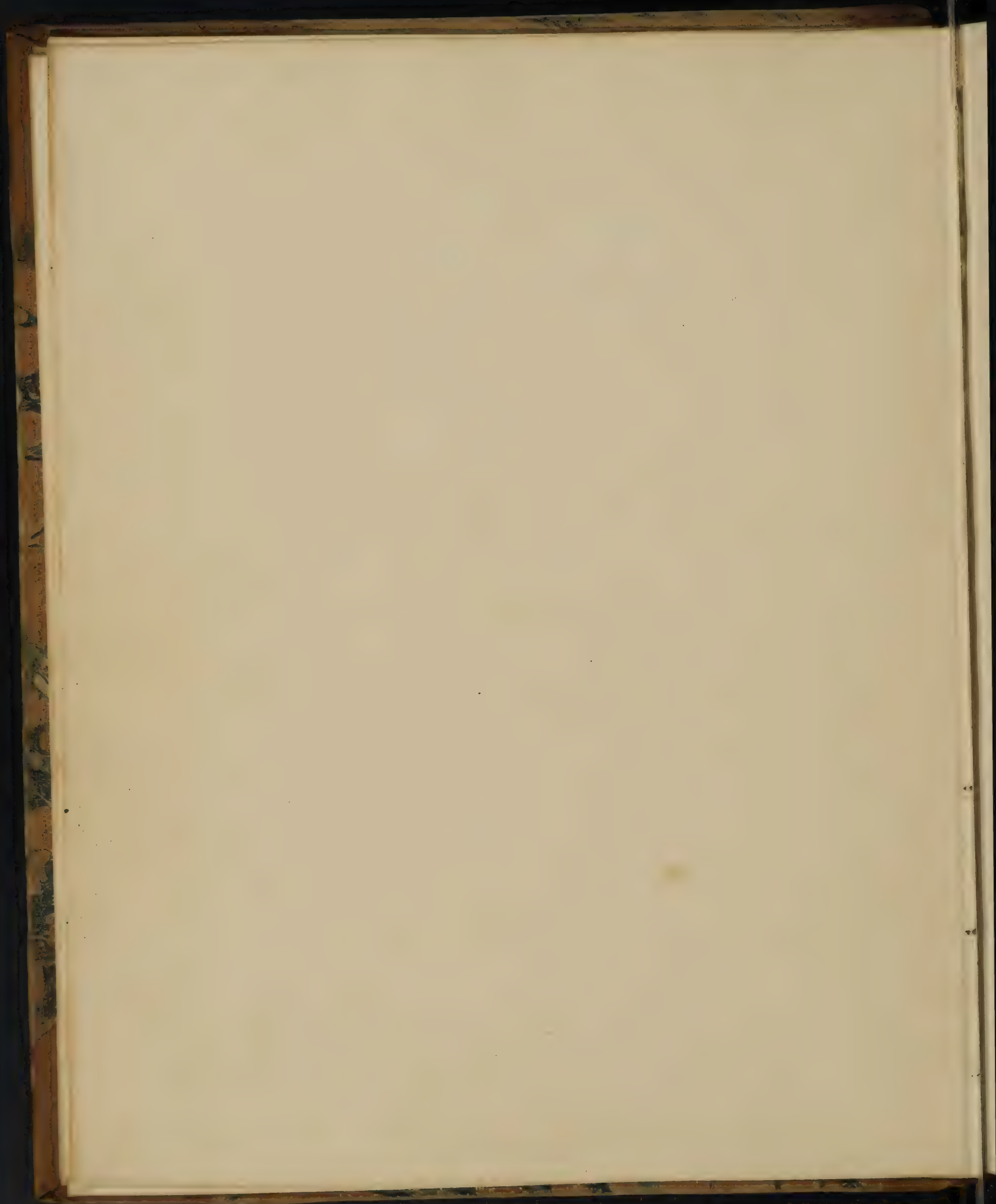












Bailments.

A bailment is defined to be a delivery of goods upon a contract express or implied that they shall be restored to the bailor or according to his directions when the purpose for which they were bailed shall have been answered, 2 Bl. 451. Jones 3 48.

Every bailment vests a qualified property in the bailee & this principle is of extensive practical application. It is said in the old books that a pawnbroker differs from other bailees because he has a property in the thing bailed, but there is no such distinction every bailment confers a qualified property or special interest in the bailee. *See* Coke *very* *strongly* *the* *distinction* *alluded* *to*. 1 Bac. 240. *See* *Tithe* 179 Jones on Bail. 112. 7. 3. Rep. 392. 397. for the distinction alluded to. *see* 4 Co. 83. b. 1 Inst. 89. a.

Indeed it may be stated as a proposition that admits no exception that a mere lawful possession which of course presupposes a present right of property, includes a qualified property or special interest & is determined in the case of finding *Ita* 505.

By the definition the bailor is to restore to bailor or his order &c. it is not from this to be understood that he is answerable in all events, for although he fails to restore yet if it is in consequence of a loss without any default in him he is regularly not liable, 1 Bac. 236. Jones 8.

But to determine when he is in fault in case of loss

a damage sustained the nature of the bailment and the quality of the thing bailed as well as bailors own conduct are to be regarded.

Different bailments require different degrees of care for what would be extra or dis any care in case of large bulky articles bailed might be gross neglect in property of a different kind. *Case 8.*

And the principal inquiry under this title is; to ascertain in all cases what degree of care & diligence is required of the different kinds of bailors or then we learn in what cases the bailor is entitled to recover.

The most general rule is, that when bailor is under a general acceptance he is bound to keep or as the case may be to use the goods with a degree of care proportioned to the nature of the bailment.

In acceptance is said to be given when there is no special agreement by bailor with respect to the degree of care or diligence that he shall use or the degree of responsibility that he shall incur. That is when it ~~is~~ left for the law to determine what care and diligence it is his duty to use, and he is accountable for not using.

But on the other hand a special acceptance is one in which there is a special agreement either extending or qualifying the bailor's liability he may thus enlarge or diminish his legal liability to any degree. In such case the bailor is not bound to use the same care as in the former case. When there is an express agreement

the one implied by law or necessity.

And the different rules
be laid down in relation to degree of care required of a
boarder can be understood as having reference to cases
of great accidentance only, for when there is a special ex-
ception according to its definition that must deter-
mine the requisite care & diligence.

The law distinguishes the
different degrees of diligence or neglect into three classes
only, without noticing the minute degree, which may
be found among men.

The standard from which these
different degrees are measured is called ordinary care
or diligence. by ordinary care is meant that which
rational men in great use in their own affairs. This
is the standard or middle term by which the
others are measured. Another word ordinary diligence is
is that which every rational man of common sense
uses in his own affairs. Sans 9.10.

The degrees of dil-
igence on each side are not distinguished by any tech-
nical or appropriate denominations but are expressed
by a periphrasis. What exceeds ordinary care is called
more than ordinary diligence. what falls short is called
less.

Now it is obvious that to every degree of care or dil-
igence there is a corresponding degree of default or neg-
lect. Neglect as here used consists in the want of
exercise of care of some degree. Hence the superior
of ordinary care is called extraordinary neglect. The

omission of that care which attention and a diligent man only in his own affairs is less than ordinary neglect. But the omission of such care as inattention, careless man use, is more than ordinary neglect. *Sons. 11. 13. 30. 31.*

The omission of slight care or such as negligent man use is justly called gross neglect. This is justly regarded as evidence of fraud or want of good faith, but it is not decisive for either when shown it is *prima facie* evidence of fraud. for if bailor has been guilty of some neglect with respect to his own goods, the presumption of fraud is excluded although the neglect is still the same, that is gross. *Ld. Ray. 915. Sons 30. 55. 64.*

The most general rule on this subject I observe is, that bailor under general acceptance is to use such a degree of care as the nature of the bailment requires.

Now to apply this general rule to particular cases it is necessary to observe three other rules. 1st When the bailment is exclusively for the benefit of the bailor, so that the bailor derives no advantage from it the bailor is bound to nothing but good faith and is liable for nothing less than gross neglect.

This rule proceeds upon the equitable maxim, *quis sentit commodum detinet sententiam onus*, i.e. he who receives the benefit ought to have the risk. As when one man

stated as gratuitously to keep or convey goods or money, whatever the rules of morality may require, the municipal law subjects the bailor for loss or damage only in case of gross neglect. It is on the presumption of fraud. *L. Ray* 915. 1 *Bow.* 247. *Don.* 15. 32. 51. 64. 101. 2.

I would here observe that in *L. Co. 83.1* (*Ponthicot's case*) it is held authoritative, that the bailor is bound to keep the goods safe at his peril, that is, with the strictest care, but this, like all the other principles advanced in that case, is exploded, except the decision which from the record appears correct.

I observe again that these rules apply to cases of gratuitous acceptance only, for by a special acceptance bailor's liability may be extended to all risks whatever. *Don.* 22. 3. 61. 2. *L. Ray.* 910.

2^d When bailor only is benefited, he is liable for slight neglect, that is he is bound to use more than ordinary care, as in case of horse or carriage lent, and the principle that governs is the same as in the former rule when bailor only, was benefited.

3^d When the bailment is for the benefit of both that is mutually advantageous, the risk is equally divided between them, the obligation hangs in an even balance, and the bailor is bound to use ordinary care & nothing more & is liable for ordinary neglect but for nothing less. for the two last rules see *Don.* 14 to 16. 23. 33. 89. 101. 105.

These three rules, I repeat apply only to cases in which the acceptance is general. I proceed now to enumerate & explain in their order.

The different kinds of Bailments.

The divisions of bailments known to the C. L. are six. Sir W. Jones makes but five & I am persuaded that the C. L. division does not appear to me the most logical. it is however the division made in the great case of Coggs & v. Bernard, the magna carta of the law of bailments, and other authorities, and is the one I have chosen to adopt. Before the case alluded to 2 L. R. 507. the law of bailment was but little understood even in Westminster Hall.

Bailment of the first kind or class is called depositum in the latin depository. This is a delivery of goods to be kept for the exclusive benefit of bailor without any reward to bailor, this is sometimes called naked bailment, and the bailor naked bailor. I shall call him depository. 2 L. R. 912 Bull. et P. 72. 1 Pow. 247.

2^d Bailment of the second class is termed commodatum. There is no single Eng. word to distinguish this kind: it is however a gratuitous loan of goods to be used by the bailor for his own benefit, & when it includes a carriage or a utensil for use to be returned specifically. It is a gratuitous loan the bailor is called the lender, the bailor the borrower 2 L. R. 914, 915.

This species of bailment differs from what is called in law *mutuum*, tho in some particulars they are precisely alike. a *mutuum* is a loan & genl. a gratuitous one, but it is for consumption & not merely for use. it is to be paid in property of the same but not to be specifically restored and for this reason a *mutuum* is not a bailment. Thus money loaned or any article of food, which are never intended to be specifically restored.

In a *mutuum* the absolute property vests instantaneously in the borrower & in case of a loss, even at the moment the property is received he bears it in all events because it is the loss of his own property & not that of another
Doc. & Stu. 129. 1 Bac. 241.

3^d *Locatio* is locatio et conductio this is a delivery of goods to be used by bailor for a reward or hire to be paid to bailor who is called locator & the bailee conductor. as when a carriage or horse is hired.

I should call this letting & hiring as the former chap is lending & borrowing. It is in fact a letting on one side and a hiring on the other. this however is not legal language Jones 50. 119. 1 Pow. 251.

4th *Chap* is a delivery of goods as a security for a debt due from the bailor to the bailee, this in latin is called '*cautum*' or pledge or pawn, the parties pawnor & pawnee 2^d Ray. 91st. Sem 50 104. 1 Pow. 251. 2.

5th As a delivery of goods to be used

some act to be done about them by bailer for a
reward to be paid him. There is no technical ap-
propriate denomination given to this class 2^d Ray
913. 914. Sams 50

^{1st} The fifth class includes deliveries
not only to common carriers who act in the discharge
of some public employment, but to private carriers
or bailers, as to common boyman or master of a ship,
- also to a tailor &c. &c.

6th Bailments of the sixth
and last class are deliveries of goods for conveyance
or for some work to be done about them gratis, without
reward. A bailment of this kind is called *mandatum*
and the bailer mandatory. 2^d Ray 913. 918. Sams
43.

The first kind to be considered & explained is
what is called deposit, being a delivery of goods to bailer
to be kept without reward, advantageous to the bailor
only and of course by the then rule he prevented
the bailer is bound only to the observance of good
faith & is liable at most for gross neglect only, nothing
short will subject him

And gross neglect subjects
him only as being *prima facie* evidence of fraud
or want of good faith & hence it follows that he is
not liable in all cases for gross neglect. See, &
Hud. 142. 2^d Ray 922. Sta 1099. Pow. 247. Bull
& 2^d Ray. Sams 32. 64. 5. And that it is the pre-
sumption of fraud only that subjects him you may
see 2^d Ray 915. 2 Bl. 452. Sta. 581. Sams 12. 2^d 64

Now it is true that you will find it laid down that ordinary care in this case will secure a bailor, which seems to imply that want of ordinary care, or ordinary neglect will subject him, but it will not. The truth is the expression was made before the term ordinary was precisely defined & ^{L^d} Holt used it in this vague sense, although he clearly supports the rule as I have laid it down. ^{L^d} Ray 913. 1 Pow. 247.

I repeat that a depository is not liable in all cases for gross neglect, indeed it appears to me the correct way of ~~thinking~~ ^{thinking} & speaking, that he is not liable at all for neglect as such, but only for the fraud proceeding from the neglect, for it is agreed that if there is no fraud he is not liable.

In this subject ^{L^d} Holt observes that if bailor is a negligent drunken him fellow, it is bailor's own fault if the goods are lost. He should not have trusted him, I think then that it is strictly true that a depository is liable for fraud only. 4 Burr. 2300. The 1099. ^{L^d} Ray 655. 914. Jones 65.6.

I would remark again for I cannot repeat it too often, that a depository may by a special acceptance or a g^t. subject himself to any extent, even to answer for inevitable accidents. you will observe that I have been speaking of the law in relation to bailors under a g^t. acceptance. ^{L^d} Ray. 655. 911. 913. 3 Burr. Whit. Eng. Law. 245. 6. 394.

See 11. Thus introducing another exception when one spontaneously becomes depository by his own offer, he is bound to use ordinary & of course liable for ordinary neglect. But this distinction is too nice to become practical, and it is not recognized in any judicial decision. Cons. 67.

The old opinions are very different from the rules now laid down. Southcott, case was an act of detainer ag^t a depository. Diff. disclaiming a special acceptance. Diff. held in bar that the goods were stolen, and on dem^r Diff. not prev^t. The decision in that case as it appears of record is doubtless correct, but there is hardly a principle laid down in that case which has not been deemed to be law and it is a little strange that and so much more justice should have been given to Kenton. 4 Co. 83. b. 1 Inst. 59. a & b. Diff. should have been stolen without his assent. But the doctrine so varied in that case, that a bailee under gen^l acceptance is bound to keep safely, ^{at all events} is not law. Cro El. 815 2 Bull. 236. 241. contra. 2 Ray 655. 911. 913 914. The 1099 Com. 113. 135. Bull. St. 272. Jones 59.

I observe by the way that the expression of L^d Holt that Southcott case is a hard one does not apply to the decision but to the doctrine contained in the case.

Again some have taken a distinction between a special agreement by depository to keep for a fixed or valuable consideration. & a special ag^t of such kind without cons^d & audit is said that the former binds him but the latter

does not. This distinction is entirely exploded, the same delivery is sufficient to support his promise.

and besides it is a solvism to say that a depository - deceptibly or conveyed for the moment he receives reward he is a deff. bailor as of the 5th Class. so that the very suppt. involves a legal subversion. State the distinction to be bad in principle as well as overruled by authority. 1 B. & C. 241. 2 Kay 927. 919. Doe & Turner 129. 12 Mod. 487. 3 Reeves Hist. Eng. Law. 245. b. 394

It was said in Southcott & an that if goods were left with a depository in a chest of which bailor kept the key, the bailor was liable for the chest only in any event and not for the goods, for it is said they are not trusted to him.

L^d Stott denies this in case of Legg & Burnard, for the bailor has as little authority over the goods as to any benefit he might have by them when they are out of a chest as when in. and as much right to defend them when in as when out of a chest.

But Mr. then Coke & Stott notices the knowledge of the depository as to the articles in the chest, and on equitable grounds that appears to me an important fact. for what in one case might be extraordinary can in another would be gross neglect. L^d Stott would have him liable if the goods were stolen.

If it were not known what was in the chest it might be doubtful how far the bailor ought to be liable unless his neglect were gross as to the

about itself. 2 Co. 83. 4 3 & 4. 1 Inst. 89. ad b. 2^o
Key 914.

The question is not definitively settled by au-
thority and I should not think that it could be laid
down unconditionally that the banker would be li-
able for the goods not knowing the contents of the
chest i.e. when not guilty of gross neglect as to the
chest.

I have observed that a depository or any other per-
son might indefinitely extend or qualify his liability.
I tell an unqualified undertaker to keep safely does
not subject him in all events. for he is excused from
losses occasioned by inevitable accident, or by
wrong doers who act by violence for even will not pro-
tect ag^t such losses. but in such case I take it that
there would not be cause as it might be prevented
by vigilance 2^o Key. 915. Doe & Son. 130. 1 Pow.
Carr. 248. 9. 100. 34. Jones 62. 75.

Indeed according to
the current of authorities and the ground on which
they stand, it appears that when a depository un-
qualifiedly engages to keep safely. he will not be
subjected without some neglect, and that an in-
engagement of that kind binds him to use ordinary
care. He is not liable for the acts of wrong doers

2^o A piece of Parliament is commodatum, in
Eng. it may be termed lending & borrowing.
It is a gratuitous loan of goods to be used by the
borrower for his own benefit only. & specifically.

restored. The bailee is of course bound to use more than ordinary diligence & is liable for less than ordinary neglect, that is for slight neglect.

The requisite degree of care must be various in the different cases so that each case is to be determined by its particular circumstances. One example has been given if a borrow a horse and place him in a stable without locking, the borrower is liable if he is stolen. but not if he had locked the stable. 2 L. R. 916. 1 Pow. 249. 250. Bull. et. P. 72. 1 Bac. 244. Com. 91.

And it seems that when loss is occasioned by burglary, without more violence than in taking and carrying away goods, the presumption is against the borrower, that he is prima facie liable unless he subjects unless he proves that he used extraordinary care Jones 61. note. 72. 2 L. R. 916.

But on the other hand he is generally not liable for loss occasioned by such force as he could not resist & hence a borrower is not liable prima facie, for loss occasioned by robbery, as distinguished from theft for can do no more than such loss any more than temerity. Thus a borrower of a horse robbed on the highway, though he might subject himself by wantonly & carelessly exposing the horse, it appears then that in case of robbery the borrower is prima facie not liable, which throws the onus on to the lender. 1 Pow. 251.

For the borrower

states a case thus if a borrower should leave the high road & travel where there was great danger, as it was known that robberies were frequently committed there, and ride on such roads in the night if he was robbed he would be liable.

But a borrower is generally not liable for those accidents called inevitable as lightnings, earthquakes, tempests, inundation &c. But he would be liable if he had wantonly exposed the property to destruction by such inevitable accident, as by rashly putting a horse into a boat in tempestuous weather.

And a borrower might render himself liable for any loss, however occasioned, by a previous breach of trust, for from that time he is a trespasser in his own wrong as if one borrow a horse to go to Hartford and go directly to Cambridge. He would be liable for all the consequences of his illegal conduct, as if the horse was struck with lightning.

So if one borrow a horse for a limited time as twenty four hours, or any other chattel in kind & does not return it by the time, he is liable for all the consequences. And this rule applies to all the species of bailment. 2 Gray 915. 917. 1 Cow. 247. 253. 1 Bac. 244. Jones. 986. Bro. 37242

B. Bailment of third kind is called locatio et conductio. In Eng. it may be called letting & hiring, it is a loan of goods to be used by the bailor for a reward to be paid by him.

By this contract the hirer gains a transient qualified property in the thing bailed. And the bailor an absolute right to the price or hire to be paid. 2 A. Ray. 913. Term. 119. Esp. Dig. 625.

Now the bailment being mutually advantageous the risk on principle ought to be equally divided between them. The bailor is bound to use ordinary diligence & more. On the other hand he is liable for ordinary negligence but nothing less.

This is what I take to be the true rule but in Coggs & v. Bernard L^d Holt says that the bailor is bound to the utmost diligence, if so he is liable for the slightest neglect. Also equally liable with a borrower, but this is contrary to analogy & to principle. The truth is L^d Holt used words that can say loosely as I think he did in this instance.

There is no writer that considers him & borrower equally liable. L^d Holt's words would extend the bailor's liability beyond all analogy, even beyond that of a borrower. Still he does not hesitate to treat it as less than that of a borrower. But the principle is so well established that there is no hazard in saying that a bailor is bound to use ordinary care only and to be subjected

by ordinary neglect. Nothing left. Jones 31. 121. 6. 123

Indeed Sir Mr. Jones traces this mistake of Holt, to a mistranslation of a Latin superlative.

As there is no decided case then requiring more than ordinary care and as no analogy requires more, the kind is of course secured in case of robbery. (So if it be proved that he wantonly exposed the property he would be liable.

It was formerly a question whether a bailor was not bound to keep in repair an instrument he had let for hire, but it is now settled that he is not. And if bailor wears out the instrument he must repair it for himself
1 Saunders 321. 1 Bac. 531. Doug. 720

^{it}
A Pignus of the fourth class is "vadimonium", or pawn or pledge for the security of a debt due from bailor to bailee. Jones 50 104. 2^d Parg. 913

And on this subject it may be material to observe that in analogy to the law of mortgages, if goods are delivered to secure a debt due from bailor, accompanied with a right of redemption, whatever may be the terms of the contract, it is still a pawn as when the goods were conveyed by an absolute bill of sale. It appearing by another instrument that the pawnor had a right to sell the pawn or

had a right to redeem, it was decided to be a pawn
for once a pawn always a pawn, 1 St. Bl. 114

This kind of bailment being advantageous to both
parties namely by securing pawns etc. and
procur[ing] or prolonging credit of pawners. the
pawnor is bound to use ordinary care & liable
for nothing less than ordinary neglect. This
is agreeable to principle & authority. 2 Ld Ray. 917.
1 Pow. 252. Salk 523. Jones 105.

But in South
cot's case 2 Ld Ray. says that the pawnor is bound to
keep the goods as his own and is liable like a deposi-
tary, for gross neglect only. The reason of it is
that he has a property in the goods but every
bailor has a property in the thing bailed, so that
there is no foundation for the distinction & the
rule founded on it is not law. 2 Co. 83. (b) con-
tra see Doe v. Turner. 12 Q. B. 172. 1 B. & C. 249. Jones
105. 112. 115. 2 Ld Ray. 917. Salk 523.

In this case
then the authorities are abundant & directly bear
weight with principle. It follows then that
when the loss is occasioned by robbery, the pawn-
or is prima facie excusable. Tho he may sub-
ject himself for any loss by breach of trust or
wanton exposure as in the former case. And
when the degree of care required of any bailor does
not exceed ordinary care, he is excusable from loss
by robbery, & is distinguished from theft. Salk 522. 2 Ld Ray.

Ray 91. 117. Jones. 61. 107. 111.

In *Souttercott* case it is laid down that the pawnor is not liable for losses occasioned by bare theft, and the reason assigned is the same as that urged to show that he is only liable for gross neglect, viz his having any property in the goods and is of course only bound to keep them as his own.

But Sir Wm Jones holds unconditionally that pawnor is liable in case of theft. This reason is as outrageous as that of *Ld Stur.* he says that the pawnor cannot be considered as having used ordinary diligence when he suffers the goods to be taken from him by stealth. 4 Co. 83. b. contra. Jones 106. 7.

But Sir Wm flatly contradicts himself as well as all the analogies of law. It is not true in fact that ordinary care will protect against thieves and it is contrary to general experience to say that rational men of common prudence do not suffer by theft. It is a question of fact whether ordinary care was used or not & this must determine pawnor's liability. *Ld Holt* places the care of loss by theft on this footing, as a factor who is bound if he use reasonable i.e. ordinary care.

Indeed Sir Wm himself says that in *commodatum* the borrower is liable for mere theft unless he shows extraordinary care thus admitting that there may be theft even when extraordinary care is used. *Ld Ray.* 91. 118. 1 Kent. 121. 1 Parson 252. Jones 92.

The pawnee gains like other bailees a qualified property in the thing bailed, but this interest is defeasible. By payment his interest is determined, or by tender which for every purpose of vesting the property in pawnee, is equivalent to actual pay^t. made & received. 1 Bac. 237. 2. Cro. J^d. 244. 4 Co. 83. b. Bull. N. P. 72. Yelv. 179. Jones 411. 2 T. Rep. 27.

If then after pay^t. or tender & demand of restitution made by pawnee on the day appointed for payment, pawnee refuses to redeliver, he is guilty of a breach of trust. & is liable of course for every loss or injury the property may sustain while in his possⁿ. however it may be occasioned as by lightning or tempest &c. Salk 523. 2 Ray 917. Esp. Dig. 635. 4 Co. 83. b. 1 Pow. 253.

And if pawnee refused to redeliver the goods on pay^t. or tender & demand of restitution, the pawnee may immediately maintain trover against him: & the rule is the same if the refusal be made by pawnee's clerk, agent or servant acting regularly in the course of his employment. In this amounts to a conversion by the merchant himself agreeable to the maxim "qui facit per alium facit per se". Included if it were not the regular business of the agent to redeliver such articles the principal would not be made liable by his refusal, it would not make the master a wrong doer. Cro. J^d. 244. Salk 441. More 841. Jones 111. 126.

In this case however the pawnee may have his election between the two actions ^{trover & det.}

the breach of trust is the foundation of the action of trover. And the breach of an express or implied contract founds a^t for an action on the promise either express or impliedly engaged to deliver or pay? B. & T. 272

But it seems that he cannot maintain either of these actions without tendering or paying all that is lawfully due the principal legal interest, even when the bailment was made on an usurious consideration, for these actions on the case are founded in equitable principles, although under some usurious contracts, yet the party claiming must do equity as between the pawnor & lender. 1 T. Rep. 153.

A refusal to deliver property pawned or paid or tender is an indictable offence at C. L. this rule is not quite as to breach of trust arising, they bring deemed civil injuries only & not offences. on this point the opinions differ but the law seems well settled. Salk 542. 3 ib. 309. Carth 277. 1 Bac. 240 2 Hawk. 210.

This rule is obviously a mere rule of policy for it is clear that a breach of trust between pawnor & pawn is no more criminal than between any contracting parties. The object of the rule is to guard the pawnor from fraud & oppression, the danger of which is greater in this, than in any other species of bailment, in as much as the transaction is quite secret so that pawnor is unable to conceal the facts. Besides pawnors are deceived by persons who are unscrupulous & unbar-

assured' who of course are the most open to fraud & oppression. Thus it is to be the true ground of the rule. —

It seems that in some instances the law may be the pledge when the use may be profitable and in others he has not this right. This right when its subject is said to be founded on human consent & perhaps a implied a ground. Now I doubt as to the foundation of this right in all cases.

Even the presumption of consent is said to exist or not in great as the thing is likely to be made better or worse or not to be affected at all by the use.

A case in which a power is made better by use can seldom occur. Sir Wm. says the power of a sitting dog which is confirmed in useful habits by exercise. And then might be a case where the chattel was pledged for a long time as a horse to be kept during the winter or year, it might be beneficial to use him moderately, this however would be allowed on another principle. *Don. 112. 12.*

And it seems agreed that when the thing pledged is of such kind as not to be injured by use, power may use it, but at his own peril, for the use is for his own advantage & he is to be answerable in all cases, as if he should be killed, & another given an earring, jewels &c. although these will at length wear out, yet the injury done them when carefully used is so small that the law does not regard it. *de minimis non curat lex.* *Gal. 522. 1 Bac. 237. B. & P. 472. 1. Roll 338, 172. 1. Inst. 84. 2. Ray. 917.*

There is the third class when the

pawnee is at expense in keeping the pledge. he may reimburse himself by using it, as when horse or oxen are hired. for he is at the expense of providing sustenance for them. not as I conceive that there is consent by pawnee. but the law allows it as a recompense that justice demands. 2 Ray. 916. 17. Esp. Dig. 625. & it are.

And I do not discover from the books that pawnee is liable to account for the use, by the Roman law he was thus bound. But the C. I. contains no such rule. Jones 115.

But when the pledge will be injured by the use & the keeping is not excessive the pawnee is not at liberty to use it. It is that there is no consent implied, even though there is none, but I doubt whether the law refers to it is necessary. It is the duty of pawnee to keep & restore when the debt is paid. As there is no expense or trouble incurred which the law will regard, there is nothing to reimburse so that there is no justice in his using it. he might injure the pawnee by something altogether foreign to the bailment. Thus both pawnees are not to be used. 2 Ray. 917. B. N. D. 72. Jones 113.

And as the pawnee has no right to use the pledge. It is that if he does he is also factually guilty of conversion and liable to pawnee in an act of tort immediately. for in the law of tort unlawful use is per se conversion. 5 Bac 257. 260.

If then the pawnee should use when the law does not allow of it, the pawnee would not be liable nor would the day arrive, he may

commence his action immediately.

The law is said to be the same with respect to goods found by a finder and to the liability of the finder. it is, very much the same, but the finder has no lien upon the goods as the bailee has. the same diligence however is required of each. as Mr Bower says the finder is bound to use ordinary diligence in keeping the property for the true owner. 2 A. Ray. 917. 1 Cow. 252.

There is a case in Cro. Eliz. in which it is said that a finder of goods is not bound to keep them safely & is not liable at all for negligent keeping. this I think cannot be law nor is it tenable on principle. it is a mere dictum. the determination of the case is doubtless right, but the reasoning is erroneous. Cro. Eliz. 219. Esp. Dig. 549. 2 Bult. 21. 1 Leon. 123. 1 Bac. 243. all these authorities agree that he is not bound to use any care and is not to be subjected for negligent keeping.

Now it would seem on first inspection that a finder ought not be subjected for any thing short of gross neglect. for the sole benefit of his possession accrues to the owner & the finder cannot compel the owner to pay him for his trouble. the finder here appears like a depository.

What in case of a deposit. the bailor delivers out the goods is not as a bailee selects his depository. he owes his man as ought to know him. this is not the case with goods found. which of course cannot be said in strictness to be bailed, and

it would seem that the finder ought to use ordinary care or leave the goods for some one to take who would be honest enough to do it.

The st. law of Conn enables a finder to recover compensation, but then the finding is clearly advantageous to both parties, the finder then is bound to use ordinary care from the first principles of bailments. - 4 Conn. 335, 6

Our statute then settles the question, & further it throws the risk on the owner provided the finder is faithful, which I think imports that he is to use ordinary care at least.

And I take the C. L. rule to be the same, the reasoning is Cro. Ely. is against it. That was an act. of trover ag^t the finder, which had been lost found & spoiled in the hands of finder by his negligence as it was alleged on Dem^r. it was held that the action would not lie. the decision was right for clearly trover will not lie for bare nonfeasance it must be a positive wrong. the gist of trover is conversion. but the dicta of the court in that case is not law. Cro Ely. 219 - 8 Co. 146. 5 Burr. 2827. Hob. 251. Esp. Dig. 579.

It is well settled at C. L. that a finder has no lien upon the goods for his trouble & expense, but upon demand made by the true owner with evidence of ownership. he is bound to deliver & if he does not he is guilty of conversion. & liable in trover. Jones before observed he is not liable. 2 Bl. 1117. 2 H. Bl. 252. An. 351.

Now the case of salvage is diff^t, when goods are wrecked
or lost or abandoned at sea, the finder is entitled to re-
ward, but this depends upon the public maritime law
of nations & not upon any rule of the C. L. Lord
Ray. 293. 2 H. Bl. 254. 5 Bac. 270.

But altho it is arg^d.
that the finder has no lien on the goods, it has been
made a moot question whether at C. L. he could in
any way recover a reward. If he can it must be by
inducement. apt. for work &c. founded on an implication
of request & promise. now the law will imply a prom-
ise but not a request for there is no privity between
the parties. the finders act is founded in courtesy,
now I confess that I do not discover room for a revo-
lution. there is nothing in the nature of a contract
either express or implied. 2 H. Bl. 258. As to volun-
tary courtesy see Hob. 106. Esp. Dig. 87. 95. I am strong-
ly inclined to think that there is no remedy for the
finder. If the owner has not honesty & honour enough
to pay the finder must lose his reward.

But a refusal
by the finder to restore the goods on demand is not of
course conversion. it is not, unless there is evidence of
ownership exhibited for if it were he might be forced
to deliver it to the first applicant. The rule is then
that if on demand and reasonable evidence of ownership
he refuses to deliver, he is to be subjected. He then is
made the judge as to the evidence, & the question wheth-
er it was reasonable or not is included in the issue
which goes to the jury 2 Bul. 312. Esp. Dig. 590.

But there is one case not decided in the books, to my knowledge, & I find goods which actually belong to A. I demand them and on refusal bring an action & by false testimony recover the full value of & A. then B. brings his action against A. can he recover? (all most questions) there are however some analogies to the case which however do not relate to finders. See 3 T. Rep. 125. 2 Bac. 11. Doug. 161. 1 Ann Bl. 669. 682. 2 id. 408. 1 Rost 445.

^{no} return to the subject of pawns
If on tender by pawnor & refusal by pawnee to deliver, the pawnor recovers in trover, the pawnor may still recover by action his own debt, notwithstanding his breach of trust. he must however first demand the money tendered. 1 Buls. 29. 31. 1 Bac. 238.

If perishable goods are pledged & they decay, pawnee does not for this reason lose his debt because the pawnor neglects to redeem. he may still sue and recover for the debt or duty remains the the pledge is lost.

And as it would be gross injustice in most cases to make one answer the other. for the pawn is something but of half the it given. is of double the value of the debt, and the law has given the parties mutual remedies. the pawn is never a satisfaction but a security for the debt.

However great may have been the misconduct of the pawnee he is still entitled to recover his debt & on the other hand pawnor may recover

for the loss of his property. And thus complete justice is done,
each party recovers what he ought to recover. 1 Inst. 209.
Salk 523. 14 Cl. 179. 1 Bac. 238.

And while the pledge remains
unimpaired in the hands of the pawnee he may sue for his
debt and recover it, unless he has qualified his right by con-
ag^t that he would rely on the pledge alone. for the pledge
alone does not satisfy the debt. Stra. 919. 14 Cl. 179. 2 Lev.
116. Esp. Dig. 86.

If the debt for which the goods were pledged
is not paid by the day appointed, the property in the
pledge becomes at law absolute in the pawnee, and is
gone from pawnee. The principle is the same as
that of mortgages, the condition is broken & the title
absolute at law. In Eq^t however the right of re-
demption is not gone in analogy to the law of mort-
gages. Shp. 106. 1 Inst. 205. 2 Vern. 691. 698. 3 Atk. 395.

It seems to me however that this equity of redemption
can be exercised only when the property remains spe-
cifically in the pawnee, or is assigned by him as
a pledge, for having absolute property he must have
the right to sell & if sold I should think pawnee
could not redeem.

A distinction is to be observed between
a pawn & a mortgage of a personal chattel, for the
mortgage has a genl. property and there is no equity of redemp-
tion after the day of paym^t i.e. after forfeiture. It does not
create a mere lien as a pawn does. 8 John. 96. 98. 5 Ch. 258.
1 Ky. 378.

But in case of a pawn properly so called this right of redemption exists after forfeiture altho it might have been agreed at first that if the property was not redeemed at the time it should be considered as sold, in analogy to the law of mortgages. once a mortgage always a mortgage and the maxim applies equally to pawns. This maxim does not supersede the principle, it means however, that if property is conveyed as a security with a right of redemption no collateral agreement made at the time shall cut off the right of redemption. This rule is intended to prevent oppression & to guard persons who are embarrassed and in distress from the hard and unreasonable conditions which creditors may impose on them. 2 Vern. 698. 1 Bac. 238. 1 New. Bl. 114.

A factor cannot pawn his principal's goods so as to give the pawnee any lien as against the principal. see Martin & Frost title agent.

The reason appears to be that the factor has but a lien & that is a personal right which cannot be transferred the contract creating it is a fiduciary contract, the principal is willing to trust the factor & give him a lien until his accounts are settled but he does not give him a right to select a new keeper. And it is now settled that if a factor pledges his principal's goods to secure his own debt, the principal may sue to recover any amount the holder after demand & without indorsing to the factor the debt due him. The act of pawning is a breach of trust by which the factor forfeits all his own rights. 11 Q. B. 5 T. Rep. 24. 1 A. Bl. 352; Easton

On failure of pay^t at the day, the pawnor is at liberty
to sell the pledge for the debt is absolutely vested in him at
law. 1 Inst 205

And according to some opinions he may sell
or assign a pledge before the day of pay^t. Owen 124. 1 Bulst. 29
31. 1 Bac. 239. But these opinions, for numerous & decisive
reasons cannot be correct. Every bailment implies a con-
tract strictly fiduciary, and J. Buller observes that a lien
is a personal right, i.e. a right annexed to the person not
transmissible, and ^{of} Ellenborough expresses the same opinion
and a doctrine of the same kind is plainly deducible
from former cases. Cro. J^d. 244. 11 Geo. 178. 5 T. Rep. 606.
7 East. 6.

Now the decision of this point one way or the
other is practically very important, for if an assign^t
before the day of pay^t is not legal, it follows that the pawnor
must not tender to the assignee, but may claim imme-
diately of the pawnor, and besides, the pawnor is ipso
facto a wrong doer & guilty of conversion.

And further
it appears contrary to the analogies of the law that a pawn
should be thus assignable. It is clear that the pawnor
cannot be forfeited to the king or public by pawning
act as treason or felony 1 Bac. 238. But a man
may, thus forfeit what he is capable of conveying in his own
right. 1 Inst. 8. 12 Co. 12. Cro. J^d. 556. 2 Bac. 376. 7.

It is also
laid down by Blackstone good authority that a pawn cannot be
aliened, meaning plainly, assigned. rule cited in 1 Ky. 389
1 Bac. 238.

Again it is settled that a pawn cannot be taken in
Est because the interest of pawn is of such a kind
to render it dangerous, to the right of pawnor to allow
the pledge to be thus taken. 1 Bac. 238. 352. Dyer 76b.
Term 124.

I think it appears satisfactorily from this anal-
ogy & principles that a pawn cannot be assigned be-
fore the day of pay^t. A pawn is in the nature
of a personal trust and if the pawn could be assigned
the pawnor would be in a dangerous situation, for if the
assignee should become a bankrupt and the pawn be lost
thus his fraud or mis conduct the pawnor could not
resort to the pawn.

Since this is the principle that
governs all fiduciary contracts as to property, the case
is different from that of a mortgage, land cannot
be embezzled and mortgages insolvent or knowing
cannot prevent redemption. But a chattel may
be run away with, destroyed or embezzled.

This is a case
in 2^d Term 691. 688 which seems to show that a pawnor
may assign a pawn before the day of pay^t. There
was a pawn to B. who sum^{mt}ly att. before day of pay^t.
pawned the same goods to C. A bill to redeem
& it was decreed that he should pay the same sum from B to
C.

It is to be observed that this bill was bro^{gt} after the forfeiture
where the equitable claim of the assignee was precisely the same
as if the assign^{mt} had been after forfeiture. We have raised
the question under discussion, if the action was bro^{gt} so

late, it should have appeared that there had been a tender in time, or the action should have been tried & decided immediately. So that the point is not determined in that case.

On the other hand the pawnor may forfeit his right to the pledge by treason or felony or any crime that works a forfeiture, but the king or public cannot take the pledge from pawnor without paying the debt, for the interest of pawnor is but the right of redemption which is forfeited. 1 Bac. 238. 1 Buls. 29. Yelv. 179. Must then that the fair construction is that pawnor cannot forfeit before forfeiture.

It was antiently deemed essential to a pawn that it should be delivered at the time the debt accrued which was intended to be secured by it. And it was as that, not if delivered afterwards it was not a pledge, but a license to rescue a trespass in taking it, to be retained during pawnor's pleasure, which he could of course reclaim when he chose, but this is not law, for it is now settled that a pawn may be delivered as well after as at the time of debt contracted or accrued. 2 Leon 30 1 Bac. 238. 9. Yelv. 164. 1 Ky. 350. 359. Bull. N. B. 35. 1 Buls. 68.

It was formerly doubted when no day of pay^t was fixed whether pay^t or tender would revert the property unless made during the joint lives of the parties. It was settled however that it might be made at any time during the life of pawnor. 1 Bac. 239. 1 Buls. 29. Yelv. 178. Coates v. C. 224. 5.

And the question has been made whether, if in such case the pawnor had assigned the pawn for a good consideration to a stranger as J. S. during the pawnor's life, the pawnor is to pay to or tender, at the death of pawnor, to his Ex^{or} or to J. S. the assignee,

This question depends entirely upon another one before mentioned, viz. whether the pawnor can legally assign a pawn before the day of pay^t. As the rule is that the pawnor in such cases is at liberty to redeem at any time during his own life, if it is assignable before forfeiture pay^t should be made to J. S. if not to pawnor's Ex^{or}. If my view of the subject before referred is correct pay^t is to be made to the Ex^{or} but to J. S. Nels. 178. 1 Bul. 29.

But when no time of pay^t is fixed the pawn must be redeemed by pay^t or tender during pawnor's life. otherwise it is forfeited, for his Ex^{or} cannot claim the right of redemption at law, for after forfeiture no legal claim can be made by him or his representatives. 1 Bul. 29 Cro. So. 244. Nels. 178. 1 Bac. 239.

You will perceive that the rule which extends & fixes the time of redemption to the life of pawnor when none is fixed by the parties, is a positive one. But the establishment of some precise time is not arbitrary, just convenience requires it, without it the contract would certainly never be accomplished. & if pawnor had no other property pawnor might in effect be defrauded for he never could dispose of the pawn.

But when the law thus limits redemption to pauper's life, I trust there is a right of redemption after his death in Eq^l. unless there are arg^{ts} to the contrary clearly proved. There is precise auth^y to this point. but it is laid down in a note in Bac. & I presume it is correct. an eq^l of redemption remains after forfeiture when the time is fixed by the parties. and I see no reason why it should not be the case when fixed by law. 1 Bac. 239.

When a day is appointed for pay^t by the parties, the pauper's interest is not forfeited by his death before the day arrives, the right of redemption is transmitted to his E^x. 1 Bul. 29. 1 Bac. 239.

Bailment of the fifth class is a delivery of goods to be carried or some other act to be done about them for a reward to be paid to bailer. It includes a delivery to private carriers or other private persons on the one hand & on the other to persons who are in the service of some public employment or common carrier. See Knapdale. 2 Ray 917. Jones 132.

The consequences of these two kinds of bailment are so different that I shall treat of them separately.

1st of delivery to a person not exercising a public employment. as taylor, factor, common agent, clerk, bailiff &c. Now a delivery to a private bailer, may be to one in a private professional character as a shoemaker, taylor &c. or to one pursuing no particular employment or profession. 2 Ray 918. Jones 50. 1289.

Bailment of this kind includes a delivery to an agisting farmer, i.e. one who pastures the cattle of another. if he takes care of them he is a bailor of the 5th class.

This bailment is advantageous to both or intended to be so. It is so in the presumption of law according to principle & authority it is well established that a bailor of this class is bound to use ordinary care only & is to be subjected for nothing less than ordinary neglect. 1 Roll. 4. L^d Ray. 918. 1 Pow. Cn. 254 12 Mod. 487. 1 Vent. 121.

A private bailor of this class is prima facie excused in case of robbery. i.e. the rule relating to him is the same and liable to the same exception as in the case of a pawnor & hirer. if he is in no fault he stands excused. Jones. 129. 30. 138.

And the rule is the same of all private bailors of the 5th class as taylors shoemakers agisting farmers. factors. brokers auctioneers agents &c. they are prima facie excused in case of loss by open violence. 1 Inst. 89. a. L^d Ray. 918. Holt. 131. L^d Co. 84. a.

In case of a loss by bare theft he is liable or not as he omitted ordinary or reasonable care or not. prima facie he is liable I trust as in all cases of bailments that are mutually advantageous, and this leads me again to remark upon an observation of Sir Wm. Jones, that ordinary care will prevent or that theft will not occur when ordinary care is required. In this case he says that if goods are locked up with

reasonable care the bailor is excused, thus in effect re-
futing or contradicting his own doctrine. It is
a question of fact in every case whether reasonable or
ordinary care was used or not. 1 Vert. 121. 2 Lew. 5. L.^a
Ray. 918. 1 Roll. 4. Jones 158.

If property bailed is dis-
trained by bailor's landlord for rent & sold as it may
be so that bailor loses it, the bailor is liable for
it was want of ordinary care to suffer the property of
another to be taken for his own debt. Jones 141. 2. 3 Bl. 8.

And this rule is doubtless common to every bailor of goods who
receives pay or compensation for keeping, or doing any act
respecting them as taylor, carrier &c. and bailments which
are mutually advantageous.

If silver be delivered to a smith
to be made into an utensil or ornament. Sir W. Jones
considers the contract as a mutuum not a bailment
since the property according to his opinion vests abso-
lutely in the smith & if lost by any event even inevi-
table the smith bears it Jones 89. 143.

And since
also he holds that the smith may use it for any other
and return an equal quantity of the same standard,

Now if our proposition is correct, no doubt the other is.
The reason on which he builds is, that the form of the
property by the terms of the contract, is to be so altered
by fusion, that it cannot be identified if so it can-
not in legal contemplation be specifically restored &

it could not have been the intention that it should be, & if this were so it cannot be a bailment but a mutuum, being similar to a loan of bread or of grapes - to be made wine or flour into bread. 2 Bl. 404. Pop. 38.

It seems difficult to deny the correctness of this artificial reasoning, & yet I never could be satisfied with it. Clearly the parties intended the property should be altered. But if the fact can be ascertained that it is the same, I confess I do not see why barrel should not bear the loss if ordinary can were used; & if the property remained as it was in the fusion the case would be still stronger. In W. however gives the same rights & liabilities immediately on delivery as after fusion founded on the intention of the parties.

Such a rule of law would bear extremely hard on that class of men if it were followed this: & the hardship of the case would I think strike a court so that the artificial technical reasoning must be very slow to induce them to follow it.

When the bailor is to do some act of skill in his profession or business or character for him, the law implies a two-fold contract, that he keep & redeliver using ordinary care, but further he is to do the work skillfully, i.e. he is to use all necessary skill.

But if not in the line of his professional business the law implies no engagement that the act shall be done skillfully, in this case therefore he cannot be subjected unless there is a special agreement.

Thus if cloth be delivered to a blacksmith to be made into garments & he ruins it. bailor has no remedy unless there was a special undertaking, it was the bailor's own folly. & the case extends within the maxim that the law will not assist fools & hazzards. 1 H. Bl. 158. 11 Co. 54. 3 Bl. 165. b. 1 Saut 324 Esp. Dig. 601 Saut 128. 9. 137. to 140

If goods delivered to bailor of the 5th class are lost or destroyed this want a remission of the requisite care. before the act he contracted to do about them, was finished. it is an incidental question whether he can recover pay for what he has done.

I see no room to doubt. it is clear that he is liable for the loss of the property. the bailor is not benefited by the labour and it was the fault of the bailor that he is not. the objection suits him in himself and it is ag^t. the dictates of common justice that he should recover. Besides it would be unequal for if he were to recover for the labour. the bailor in his action for the goods or their value. ought of course to be allowed the value of the goods as increased by the labour 3 Burr. 1592 to 5. Esp. Dig. 86.

2^d Bailments of the fifth class include also a delivery to a person who exercises some public employment as a common carrier. innkeeper &c. of this I am now to treat. & first of a common carrier.

A common carrier is any person or person who makes it his business to carry the goods of another for hire as a common person. or man. or wagoner

hoymer, freighter shipmaster to L^a Ray. 918. Jones 149. 151.
L Co. 84

It was formerly doubted whether any other than a
land carrier was a common carrier, but it is now settled
to be immaterial whether the transportation be by land or
water. Hob. 17. 18. Co J² 330. 12 Mod? 487

The law was first
extended to common hoymer in J² 1. to shipmaster in
Chit. 2. Jones 149. 152.

Owners of ships employed in car-
rying goods for others are consid^d. as com. car^r. & in case
of a loss an action may be bro^t. ag^t. either the master
or the owner. Salk 440. 1 T. Rep. 18. 78. 3 Lw. 259. Caute
62. 1 Show. 29. 101. Esp. Dig. 623.

Drivers of waggons are
not liable unless they are also the owners. There is a stat in Eng.
7 Geo. 2 limiting the liability of ship owners to the
value of the ship & freight, when loss is occasioned by the
navigator. this your statute is not a rule of C.L. & does
not affect us. 1 T. Rep. 18. 78.

If a com. car^r. having the
convenience, to carry goods offered him refuses to take
them when the hire is tendered, he is liable in an actⁿ.
of ass^l to the party offering. For the law implies a contract
on the part of com. car^r. to carry all goods offered them,
as the public calculate upon them and they cannot ca-
piciously refuse, their duty is like that of an innkeeper
who cannot refuse to receive a guest without suff^r cause.
1 Bac. 344. B. N. P. 70. 3 Bl. 166. 2 Show. 327.

But a com-
mon car^r. is at liberty to make a special acceptance

i.e. a conditional one. E.g. that he will not be answerable for specific articles as money, jewels &c. unless he is notified of their being contained in the parcel & is paid according to their value. And his not liable as a common carrier unless the condition is complied with.

This is very reasonable, for he ought to know how to apportion his diligence, the greater the value the greater the risk,

A common carrier cannot however, impose what terms he pleases, or such unreasonable ones as destroys his liability as not to be liable for neglect or robbery or loss arising from ship being unseaworthy. - These conditions would but purchase a subterfuge for the wrong. 4 Bur. 2298. Esp. Dig. 622

An event case in which a stage owner suffered for the carelessness of the driver of the stage between Chert & St. H. occasioned him to advertise that he would not be accountable for the negligence of his drivers, such a condition could not be enforced, and the notice will not avail him. the effect is the same & no greater than if he should publish that he would not be accountable for his own neglect or fraud.

This kind of disclaimer being advantageous to both, if there were nothing to impede the operation of the genl rule, the com. car^r would be bound to use ordinary care only & could be subjected for nothing less than ordinary neglect. & it was held in the time of Hen 8th that robbery was not a case. *144.* But it was settled in the time of Ed. that

robbery was no excuse. 4 Co. 84. a. 1 Roll. 2. Jones 144. 5. 1 Bos. 245.

And the rule now is that he is liable for losses occasioned in any way except by the acts of God, inevitable accidents, or the acts of public enemies, or the act of the bailor himself. 2^d Ray. 918. 3 Bos. 1593. Bull. St. P. 70. 71. 1 T. Rep. 27. 1 East. 609. 1 Bow. Am. 283. Salk. 18. 1 Wils. 281.

This was not the orig^l rule of C. L. the true foundation of it is public policy that works an exception. for by the then gen^l rules advanced at the commencement of this title, when the bailment was mutually advantageous to both, the bailor's liability was limited to or did not include any neglects but public policy requires a more extended liability. For the exigencies of commerce require some persons to act as carriers and that the public should have confidence in them. As every person there may become a com. carrier the law ought to make the bailor safe against the fraud of such persons, and against their connivance with robbers & thieves. And the opportunities of defrauding are so numerous, that the law imposes a higher liability than strict justice between man & man would require. 2^d Ray. 918. 1 T. Rep. 34. Salk 143. Esp. Dig. 618.

In Southcote can 2^d Cote says that the ground of a com. carrier's liability is that he has a reward, it is not so, for the reason is equally applicable to a private carrier or any bailor involved when the bailment was mutually advantageous, it is true that if bailor means no reward he is not liable

for in such case he does not act as a com. carrier & of course
cannot be subjected as such. Carth. 485. 1 East. 604. Esp. Dig
621.

You perceive then that a com. carrier is in the nature of
our insurer ag^t all events but the act of God or public
enemies or of the bailor himself.

By the act of God ac-
cording to L^d Mansfield is meant an act which can-
not happen by the intervention of man. as earthquakes
lightning inundations tempests &c. 1 T. Rep 33. Stra. 128

Fire occasioned otherwise than by lightning is not
deemed the act of God. 1 T. Rep. 34. 2 Str. Bl. 113. Esp.
Dig. 620.

And it has been determined that a common
carrier by water is not excused by a rats gnawing a hole
thru the ship & occasioning loss or damage. Sir W.
says ordinary care will prevent such losses. this I doubt
doubt. still it is not inevitable accident within the
rule. 1 Wils. 281. Bull. Ct. P. 70. Jones. 147

A common carrier
is not excused by the act of a man not. insurgents or
rebels for they are not public enemies within the rule
But when a loss is occasioned by pirates he is excused
for such are deemed the enemies of civil society. 1 Vent
239. It is not however excused by what are called
fresh water pirates that infest rivers harbours &c. they
not being regarded as public enemies. 1 T. Rep. 18. 1 Vent.
190. 1 Mod. 85. Esp. Dig. 620.

If it is made necessary by the

act of God. or by tempests to throw goods overboard, the carrier is excused for doing it, for the necessity is inevitable the immediate act is by the carrier. 1 Roll. 567. 1 Roll. Rep. 79. 2 Bulst. 282. Jones 151. Esp. Dig. 620

There is a case in Allyn 93. when a common carrier was made liable for throwing a box of jewels over. the case is badly reported and the probability is that there was no necessity for throwing it over. we should suppose a box of that kind to be very light. and this was probably the ground the jury went upon. The general rule is well settled.

When goods are thrown over necessarily; the master, owners, freighters & passengers must average the loss among them, the mariners are not included. This is a rule of the law merchant. & not a C. L. rule. 3 Bac. 394. 5. 1 East 220. Brown, Les Merc. 148. 2 T. Rep. 407.

But if a common carrier voluntarily & unnecessarily exposes the goods to danger from inevitable accident & doubtless from public enemies, he is not excused. as when a boyaner voluntarily put to sea in tempestuous weather, when a loss was probable but he would be liable although the immediate proximate cause was inevitable accident. The. 128. This doctrine was recognized in a recent case before the court of errors. Williams & Grant.

A common carrier is excused according to the exception to the general rule when the loss is occasioned by the act of the bailor himself. Thus when an action was brought for

the loss of a pipe ^{of wine} occasioned by bursting. It appeared at the trial that the wine was in a state of fermentation when sent, this bursting occasioned the bursting, the car^r was held not liable. it was the act of the bailor in sending it at an improper time. Bull. Ct. D. 69. 74. E. 1. Dig. 621.

And again when the waggan of a common carrier was full & the bailor forced the goods upon him. and a loss was occasioned by over loading. the bailor was reversed on the ground that it was the fault of the bailor. 2 Show. 127. 1 Bac. 344.

But in order to charge the com. car^r to the extent of the genl. rule the goods must have been lost while in his possession or under his immediate care & control. for if the owner sends a servant with the goods in a vessel to have the custody of them & they are stolen the carrier is not liable i. e. as a common carrier. for he does not act as such when the goods are under the control & guardianship of another.

Still however if the loss was occasioned by the actual default of bailor, altho the goods were committed to the immediate care of another, the bailor would be liable. as if they were lost by vessels not being seaworthy or the misconduct or negligence of the seamen. Bull. Ct. D. 70. 2 Show. 327. Stra. 690. 1 Bac. 344.

But when goods were delivered to a com. car^r & a passenger was requested to take the oversight of them. the car^r was adjudged liable for a loss. for a more request like that, to look after

the goods does not deprive him of possession or control over them
1 Ball. 2 Cr. 330. Hol. 17.

And it seems that a common carrier, the ignorant of the contents of a box or parcel is liable for the goods in case of loss unless he discharges himself by a qualified acceptance, or some condition excusing him.
Hunt. Bull. St. P. & O. v. East. 128. Sta. 125. Canth. 485.
Lans. 148. 1 Bac. 345.

If such condition is prescribed & the bailor does not comply by informing the bailor is in this not liable at all or only to the value of what is specifically accepted.

It will doubtless be remembered that I questioned the propriety of the rule making a depository liable when he did not know the contents of the parcel, unless he was grossly negligent as to the parcel. Still I take it that the rule just laid down as to a common carrier liability in such case, is strictly correct. For here the bailment is mutually advantageous to both bailor & carrier. & the common carrier liability does not depend upon the degree of care or negligence that he may use, the nature of the goods thus cannot affect his liability. And if he is willing to run the risk and to accept unconditionally, he ought to be liable, so that the rule appears correct.

There are two cases in which it was determined that the common carrier was liable when he was misinformed as to the contents of the parcel by the owner, unless the acceptance was special, and in both the cases the owner intended

to defend the carrier which the Ch. Justice observed
might go in mitigation of damages. *Allyn*. 93. 1 Vent.
238. Bull. N.P. 70. 1 Bos. 345. 3 Keb. 135. Doc. & Sta. 130

You will observe that in both these cases the owner misrep-
resented for the purpose of diminishing the hire.

Those decisions appear to me contrary to principle. They
are pointedly disapproved of by *Ld. King* & *disapproved* &
may now be regarded I trust as overruled. Those judges say
that a com. car^t ought to be received on the ground of fraud
and perhaps the case would come within the third excep-
tion to the genl. being a loss occasioned by the act of the
bailee. 4 Burr. 2300. 1 East. 610. *Darus*. 148. *Sta*. 145.

I would

just observe that for the purpose of making a special ac-
ceptance, it is not necessary that there should have been
a personal communication between the parties, a notice in
a public newspaper of the terms on which the com.
carrier engages to transport may be sufft. I say *may*
be, for it may not. And when the car^t depends on
the ground of special acceptance & notice given not
complied with, the jury may infer from such advertisement
that the owner had notice. it does not per se screen
the carrier but if it appears that the owner had notice
the jury will so find. — the publication is some mat-
ter of evidence. 4 Burr. 2298. *Carth*. 285. Bull. N.P. 71.
1 Den. Bl. 298. 8 T. Rep 531. *Est*. Dig. 622.

You have seen

from the rules already laid down, that under a genl. or special
accept in case of fraud, a common carrier is liable to the full

amount of the goods received, altho he may not know the value of them, but when he accepts specially, he is liable for so much only as he undertakes to convey, or in other words for so much only as his reward extends to. Thus where a bag delivered to carrier was described as containing only \$200 when it actually contained \$400, the carrier was held liable only for the two hundred. *Conth. 485. Bull. N.P. 70. 71. Esp. Dig. 621*

And when a com^{on} carrier publishes that he would not be answerable for certain valuable articles, at all, such as money jewels &c except on certain conditions & they were not complied with altho known to bailor, the com^{on} car^r was adjudged not liable at all, as when the condition is of being informed of the value, & he was misinformed. This case is different from the former, then the condition was that he would be liable only to the amount he was paid for. here the car^r says he will not be liable at all unless informed &c. *1 Am. Bl. 298*

The master of a stage coach who receives hire for passengers but not for baggage is not liable as a common carrier, but if he carries goods for hire he is thus liable. *Conn. Rep. 25. Salk 282 Bull. N.P. 70. Esp. Dig. 622. 624. 2 Show. 128. 1 Bac. 344.*

Thus a common carrier is liable according to the distinction here taken, whether paid before he loads or not for what he carries, as there was an express promise to pay or not, he can recover on the implied promise on a quantum meruit. *1 Bac. 343*

It is however more bound to

receive goods unless payment or tender of the hire is made to him.

~~To~~ exchange the carrier it is not necessary that the goods be lost in transit i.e. while passing or moving for if lost at the inn where he arrives he is in general liable. He is clearly liable in this case if the custom is to deliver to the consignee. If that is not the custom he is liable until the time of delivery, so that in either case he is prima facie liable and the onus is thrown upon him. 2 Bl. Rep. 916. 3 Will. 429. Cowen 57. Esp. Dig. 523.

But when the custom is not to deliver to the consignee in person, but for the carrier to take the goods out to deliver at a common warehouse, he ceases to be liable as a common carrier. tho if he is keeper he may be liable in another character. but the goods are not in his custody. he ceases to be liable entirely at the delivery. 4 T. Rep. 581. Esp. Dig. 523.

If the consignee directs by whom the goods are to be lost he is regularly to bring the action in case of a loss & not the consignor, tho if the purchaser is to sue & not the seller as if I purchase goods or send an order for them. then I am the bailor. as between the seller & myself I am the risk. the carrier's act is my act. If a right of action occurs I must improve it. 8 T. Rep. 330. Corah. 294. Bull. et. P. 35. 1 Pow. Cur 343. 353. Esp. Dig. 516.

But when

the consignor selects his own carrier, the right of action for loss or damage is generally in him. as if I order goods

and the seller delivers them to which carrier he prefers, in case of a loss he must bring the action. for there is no privity between him & the carrier. And even when I have designated the carrier if the seller makes himself liable by agreeing for the price of conveyance or takes the risk of conveyance, he may bring the action. for the ag^t makes him principal and creates a privity between him & the carrier. 5 Burr. 2680 1 T. Rep. 659. 8 id. 333.

As to joinder of parties and how to take advantage of non joinder see Pl & Prod. & also Salk 440. 5 T. Rep. 651. Esp. Dig. 623. 5 Burr. 2611. 2614.

At C.L. a post master not being an officer appointed by the government was considered as a common carrier of the letters he committed to him & adjudged liable as such. But since the stat 12 Car. 2. established a general office & suppressed private posts, post masters are not held liable as common carriers, they are regarded as executive officers of the government, a post master makes no contract with the party who lodges letters, receives no compensation from him. he is paid by the government & his wages are in the nature of a poundage upon what he collects. still it is received from the government. therefore there is no privity between him and the party delivering letters at the office. Salk. 17. L'Kay 646. Cowp 754. 764. L^d Holt's opinion is ag^t this rule but I take it to be well established.

And a post master is regularly not

liable for the actual defaults of his servants or under officers, tho he is for his own actual defaults like any other individual. But his servants and under officers are the servants of the government, and he acts as a servant of the government in appointing them. 3 Will. 443. Comp 765. Salk 18.

Common carriers have been said to be liable on the custom of the realm & the common method of declaring has been to count upon & recite the custom as if it were a special one of force in particular districts only. But this is certainly no more necessary than it is for an heir at law to count upon & recite the customs of descent for a custom of the realm is no other than a part of the C.L. extending throughout the realm. Sid. 245. Hard. 485. b. Hob. 18. 1 T. Rep. 33. 3 Mod. 227. Com. 130

When property is stolen from a common carrier or otherwise lost or injured so as to subject him, when there is no fault in him when he is guilty of no misfeasance, the remedy is by a special action on the case, trover will not lie. But if he is guilty of an actual misfeasance as by breaking a box trove will lie. & when one pierces a pipe of wine and draws out a little it was deemed a conversion of the whole. 8 Co. 146. 5 Burr. 2827. 5 Bac. 527. Salk 655. Hob. 251.

It is not then liable in trover for actual negligence because to subject him to this action he must have been guilty of some actual misfeasance. Salk 655.

Another class of persons exercising a public employment consists of Inn keepers.

A delivery of goods or baggage to an innkeeper is a bailment of the 5th Class. This subject has been strongly elucidated by different authors. Espinasse places it with commodation to which it has not the least affinity. Buller treats it as a mandat which is equally incorrect, the true place no doubt is in the 5th Class of bailments. *Ann. 130 to 132. Esp. Dig. 625.6. Bull. N.P. 72.3.*

It is not however very important when it is elucidated as the rules relating to it are so well defined, still it is very manifest that it belongs here, because it is a delivery to another to do some act about for a reward is given, altho there may be no nominal reward, the pay is included in the charge for room rent &c. storage. *Ann. 133.*

In this place I shall consider Innkeepers as they are liable for the goods delivered them by their guests, i.e. as bailees which they unquestionably are, their other rights & duties will be the subject of a distinct title.

The bailment being mutually advantageous in these cases, according to genl. principles the innkeeper is bound only for ordinary care liable for nothing less than ordinary neglect, but the policy of the law has extended the liability somewhat farther not so far however as that of a common carrier at least I find no author extending it thus far. *Ann. 133 to 135.*

In the first place then an innkeeper is clearly liable for any loss occasioned by the act or default of his servants in any way. for he is bound at all events to provide honest & careful servants. 8 Co. 32, 3. Bull. et D. 33. 1 Bl. 430. Esp. Dig. 626.

You will doubtless recollect that masters are in general not liable at all for the wilful torts of his servant much less for his offences. But if an innkeeper's servant steals or robs the master is liable civiliter for all the damage occasioned thereby.

So if goods are stolen by a stranger the innkeeper is liable by the general rule whether he has been negligent or not. so that something more than ordinary care is required of an innkeeper. The rule is founded in policy for an innkeeper has a great opportunity to cheat & rob and to mix with knaves & thieves for the purpose. the rule then is for the safety of the public. 8 Co. 33. a. Cro. Jac. 189. 224. 5 T. Rep. 276.

There is

an exception to this general rule however when the goods of a guest are stolen by his own servant or companion or by any one who by his request lodges in the same room with him. for the law in such case imputes the loss to his own folly for by travelling with the companion he gave him credit and by requesting the stranger to lodge in the room he furnished the occasion of stealing. by showing him where the effects were and affording him greater facility to steal than Geo. Eli. 285. 8 Co. 33. 3 Bac. 183. Esp. Dig. 625.

And an innkeeper I trust is liable for a loss occasioned by an act of common robbery & on the same principle of policy there is however nothing definite to be found on this subject. Plowden says that if the house is broken & goods taken he is not liable. I find however no rule that places him under the same liability with a common carrier. Jones says that a force truly irresistible occurs in the innkeeper, i.e. if it were irresistible by the innkeeper & all the force he could command. indeed the reason Plowden gives why robbery occurs is that such violence cannot be resisted. Sir Wm Jones rule appears to be the correct one, 8 Co. 32. a. Jones 138. a & b. Plow. 9. 3 Bac. 182.

The common impression is that an innkeeper is liable to the same extent with a common carrier. & I confess I do not see why he should not be, his house is absolutely necessary for the accommodation of travellers his means of defence are incomparably greater than those of a common carrier. he is surrounded by his estate in the midst of his family and his means of colluding with robbers & thieves & affording them facilities to depredate much greater than a common carrier, who on the other hand is travelling on the highway usually alone & unprotected.

It is laid down by Coke that an innkeeper is not liable unless there is a default in him or his servants, thus reducing his liability below ordinary carriers. Buller denies this & says that to subject an innkeeper it is never necessary to

poor negligence. A common carrier you remember is liable for all losses, except those occasioned by the act of God, or a public enemy or of the bailor himself. The exception is more comprehensive in favour of an innkeeper who is liable if the loss is occasioned by any irresistible force. 8 Co. 33. a. and to be law. 5 T. Rep. 276. Esp. has added 2 a note, and that since the decision 5 T. Rep. he is apt to make mistakes. Esp. Dig. 626.7.

An innkeeper however is liable as such for those goods only that are "in praesentia", including stocks & out houses. 8 Co. 32. b.

If then the effects are removed by the owners direction and yet the innkeeper is not liable as such, unless there is some actual default in him. As if he should order his horse to pasture, if he were lost the innkeeper would not be liable unless indeed the loss was occasioned by want of force, not however on the principles which govern this title.

On the other hand if the innkeeper puts the horse to pasture without the consent & direction of the owner he would be liable. 8 Co. 32. b. / Roll. 4. Bull. ex. P. 73. Esp. Dig. 626.7.

The remaining rules relating to innkeepers will be considered in a short title by themselves. —

§ 16 Bailment of the last kind is called *mandatum* or *mandate*. It is a delivery of goods to a bailor to be carried or some act to be done about or upon them, without a reward, or gratuitously.

The appropriate name is *mandate* it is sometimes improperly called acting by commission but it has no relation to that species of trust. The bailment is a *mandatum*, the bailor a *mandatary*. Jones 50. 73. L'Ray 918.

The difference between a *mandatum* & a deposit is merely that the latter lies in custody or keeping *propter* the former in fearance or conveyance of doing something with or about.

This species then appears to be of the same nature with a deposit, it is beneficial to the bailor and so by good principles it is clear as it is well established by authority the bailor is bound to good faith & liable for gross neglect only. L'Ray. 909 909. 1 Pow. Com. 255. 1 Steu. Bl. 158. 161. 2.

As in other kinds of bailments when there is a special ag^t to use a given degree of care the bailor is liable if loss is occasioned by his omitting to use it. this was the case in *Cogg* & *Bernard*. it. anc. Jones. 75.

And an ag^t to use all necessary care & skill may be implied in certain cases. But such an ag^t is not implied unless the act to be done is in the way of the bailor's profession or occupation. Thus if a Taylor engages gratuitously to make a garment he is impliedly engaged to use all the requisite care & skill.

the agt. is presumed from the fact of its being in the line of his business. for if cloth were delivered to a blacksmith under such an engag^t it would not subject him not to work with skill. 3 Bl. 165. 6. 1 Hum. Bl. 158 11 Co. 54. 1 Saunders 324. Jones 139.

In W. Jones on the distinction between the duty a mandator, when it consists in performance & custody; in other words between the duty of bailor when it lies in possession & keeping prop^m. When his duty consists in actual possession he says a greater degree of diligence is requisite, to use his own expression "a degree of diligence adequate to the performance of the undertaking."

Now I confess that this is a distinction of which I neither see the reason nor feel the propriety. it is arbitrary & not countenanced by any judicial determination. It is an unhappy peculiarity in this excellent little treatise. denied to be law. 3 Bl. 165. 6. 1 Hum. Bl. 158

This is I trust a distinction unknown to the C. L. There is however a doctrine advanced in the case last quoted from Hum Bl. by J^r Loughborough which deserves attention as coming from such respectable authority. He says that when the engag^t by the bailor is to do the act skillfully the omission of the necessary skill is gross negligence & so when the law implies such an undertaking that if a loss were occasioned by a mistake it is gross neglect in him not to perform his engag^t. The amount is that when a bailor is subjected, he is of course guilty of gross neglect. Such a declaration compounds the

different degrees of care & neglect - the whole argument in the case of Coggs & Bernard & all the other subsequent cases are rendered negatory. for it induces all bailors to a level by subjecting them all when in any manner liable, on the ground of gross neglect, it changes the whole symmetry of the system. with equal propriety it might be said that a common carrier when subjected at all was liable on the ground of gross neglect. as if he were not. L^d Longbrough appears to give the ground that a bailor by his engag^t is subjected only for gross neglect. whereas a bailor may be subjected by slight or ordinary neglect.

When there is no engag^t proper im^p to use skill or more care than he uses in his own affairs he is liable for gross neglect only. Thus in the case in the B. L. A & B having two consignments of goods. A agrees to store them both at the custom house: but A having intended them by a wrong description they were forfeited by the revenue laws. Therefore B. brought his action ag^t A, but he could not recover there was no special engag^t to use skill and the law implied none A being agent merchant, and altho he might in fact have been guilty of gross neglect yet as he lost his own goods it afforded no presumption of fraud. 1 Ann B. 158. 1 Dow. Con. 255.

The true distinction then I take to be, that when one engages to do an act gratuitously in the line of his profession or occupation. the law im^pies an ag^t on his part to use all necessary care & skill. but when the act stipulated to be done is not within the line

of mandatories profession, he is liable only for gross neglect

The ag. ^{is} thus implied by law extends it seems only to the performance or the doing of the act stipulated to be done & does not provide ag. ^{from} accidents, foreign causes. that is not connected with the stipulated act.

Thus in the case of the taylor before mentioned. the law implies a contract to use the necessary care while in making the garment. but not to preserve the garment or estate from robbery inevitable accident &c & he is not liable for losses thus occasioned unless he is guilty of gross neglect in exposing the goods. As to the duty of keeping & restoring the law implies no greater liability on his part, than on the part of a person who is of no particular occupation or a mere depository.

Thus if the taylor agrees gratuitously to make a garment, if not well made he is liable, but if well made and stolen afterwards because he left his door open. the question of his liability must depend on the proof offered in the gross neglect which is presumption, if the goods of bailor only were exposed. if he had entrusted the garment to a known thief he would be liable. This I take to be the extent of a mandatory, liability when employed professionally, it appears consonant with the opinion of *L^d Holt* tho. he is not very precise. *L^d Ray* 918. / *Pow* Com. 255.

And then is an ^{agent} by a mandatory to keep safely. he is not liable for losses occasioned by robbery or inevitable accident

and I think clearly that he is not liable and such an agreement without some degree of default. When one contracts thus to keep safely, he only means that he will use all necessary care for that purpose. He cannot be considered as insuring against the will of God, or against irresistible force. So that if he is in no default he will not be liable however an condition of the agreement be. La Ray. 910. 915. Jones. 62.

But I trust that a mandatary cannot secure himself by special agreement from liability for fraud, it is contra bonos mores & so illegal by the principles of contract. Jones 66. 75.

There has been some contrariety of opinion expressed as to how far an agreement by a mandatary is binding as a contract, that is an agreement to carry goods or to do some act about them gratuitously. according to some opinions the mandatary is not bound by his agreement as a contract, because it is understood gratuitously, but his liability is founded in tort or fraud or want of care.

According to others, & as I think, on principle, upon delivery his agreement the voluntary binds him, as a contract. it is so far voluntary that he gets no benefit until the delivery is sufficient. La Ray. 909. 10. 919. 20

The true distinction is that if one gratuitously engages to be the mandatary of another & afterwards refuses to become one, he is not bound, the contract is unperfected. but if the goods are actually delivered into his hands, he is liable & may be sued in assumpsit which sounds

altogether in contract. it is true however that he may also be
sued in tort. 5 T. Rep. 143. Distinction then taken is that
if A agrees gratuitously, for B. if B does not deliver the mat-
erials A is not bound, but if he does A is liable.

L^d Holt says that a delivery on one side & an entry on the
trust by the other is suff^t con. 12^d L^d Ray. 920. 1 Bac. 241
See also 129. 12 Mod. 487. 5 T. Rep. 149. 150. 1 Per. 364.
Cro. J. 667. Contra. Yelw. 4. 128.

In that case in Yelverton it
was held that the ag^t did not bind as a contract &
there are other opinions to that effect. But the case
in Cro. J. is a very strong case precisely in point, and the
case in Yelverton is then considered & overruled. In Cro. J.
delivered money to B on a promise by B. to deliver it over to A
without reward. B failed to perform. A then brought
his action ag^t B on the express promise stating the delivery
only a consideration & recovered. Now it is impossible
for him to recover thus unless the ag^t were binding as
a contract. It is true A might have recovered had he
brought an actⁿ on implied ass^t for money had & received,
but this was an express contract & seems to have been bro-
ke purpose to try the question. Cro. J. 667. L^d Holt
recognizes & confirms this doctrine in the case of Coggs
v. Bernard.

Sir Wm Jones observes however that where special
damage arises by bailies not performing his agreement
by not becoming an agent when he has agreed to
an action will lie ag^t him. Jones 76. to 80.

He also says
that the ground of the action in these last cases

is some special damage, but it is to be remembered that it is a breach of contract. the damage accrues from the breach of contract. it is sufficient to suppose that there can be special damage in consequence of the breach of a contract that does not exist.

Thus A agrees gratuitously that B will carry a letter to C. H. from disappointment or even caprice if you please. he does not carry it, and B suffers a loss in consequence. Sir W. Jones says that an act of A would lie. I can see however that I know of no principle of C. L. to support him. True if there were an actual delivery, or even if paid or promised or paid in the case A might sustain his action.

Sir W. Jones agrees that the action cannot be sustained unless there is special damage. but if there is it can, now every civil action must stand in contract or tort. by the hypothesis there is no fraud or misfeasance so that A cannot be subjected on that ground, but can be subjected on the ground of contract. Sir W. says yes, but how is it to support the action, the validity of a contract is in genl. to be determined from the facts existing at the time of contract made. it must be good ab initio. and although special damage may increase damages in amount on the breach. yet special damage can never give validity to a nondum factum, can never go to the question as to the right of action. a contract cannot be made binding by anything except facts. And if a contract has not virtue enough to support an action without special damage, it certainly cannot have with

Fin Wm is certainly mistaken. that no special dan-
age is necessary you may see. 2 A Ray. 909. 10. 919. 20
Toms. 76. 80.

Toms says further that when an act is bro't
ag't a mandatory negligence is the ground of the action
brought his express undertaking. I do not see how his sub-
ject is by negligence. if contract is the foundation of the
action. negligence is out of the question. If negligence is
the ground of the action it must be on the ground merely
that the party has been guilty of a breach of contract & there-
fore the act may be bro't on the promise.

Baridg one or two
cases contradictory to this. when a mandatory express un-
dertakes to use a given degree of care he is bound to the ex-
tent of that engagement. but how can he be subjected by his
express promise when that does not bind him. how can
it extend his liability beyond what the law would
require of him. a carrier mandatory engages to car-
ry goods & warrants ag't robbers. books settle the ques-
tion that he is liable in case of loss. how? Toms
says in consequence of negligence. but not, would he
use the utmost diligence. would he not be liable?
Provis it that he is liable further than the law re-
quires. if the ag't is a voluntarium factum. It follows
then that the contract binds him. Fin Wm Toms
is confused on this subject but his authority is too
respectable to be kept in silence.

The true dis-
tinction is that when ^{one} engages ^{gratuitously} to become the mandator
of another & afterwards refuses he is not liable

but if he does become bailor & makes any engagement
is bound to the extent of it by virtue of the con-
tract. 2^d Ray. 910. 19. 5 East. 140. 149. 50. 3 East. 62

There are certain miscellaneous rules applying to bail-
ments in genl. with which I would now present you,
and under this genl. division, the first enquiry is, in what
cases the bailor is entitled to a lien against the bailor.

Now a lien is a direct claim or incumbrance upon some
specific property of another by way of security for a debt
or duty and is always accompanied with actual
possession.

A special property & a lien are two distinct
things. There can be no lien without special property
but there may be a special property without a lien.
A lien exists in favour of bailors of the fourth & fifth class
Bailors of the 4th class you will recollect are pawnors, those
of the 5th are those who undertake to do some act with
or about the goods for which they receive a reward. a
lien does not exist however in favour of all bailors of the
fifth class.

All pawnors have a lien on the goods pawned
it is created by delivery & the terms of the bailment
without any thing done or fact by bailor. The
precise object is to create a lien to secure a debt or duty,
& the security consists essentially in the retention of the
lien and right of possession. The pawnor then has right
as in all cases where the contract is lawful to hold the prop-
erty until the purpose of the bailment is accomplished

which is a discharge of the debt or duty. Cro. El. 244.5
Yelv. 178. Talk 522. Du. Cha. 419. Esp. Dig. 583

Most bailles
of the fifth class have a lien, i.e. a right to retain prop^y
against the bailor by way of security for compensation
from the lien is not created by the terms of the bailment,
as in the case of the pawnbroker, the object of it was that
bailor should do something for which he is to have
a reward for the security of which he has a lien upon the
goods but condition is how annexed to the Bailment.

The law does not require that bailor should for his own
safety demand pay & before he has rec^d but enables
him to retain the property until he is paid. 3 Bae. 185.
Hob. 42.

It is not universally true that bailors of the
fifth class have a lien although they have I will dis-
tinguish as I proceed.

2^d Some certain bailors have a lien yet
a third person who obtains possession wrongfully from the
bailor cannot avail himself of it. The bailor may re-
cover without tendering to anybody. As if A pawns
goods to B & C gets wrongful possession, A may recover
them without tender & C cannot retain as Tenter, 2
D. Rep 485. 3 East. 585

In the 1st class. A common
Car^r has this lien, a right to retain the goods against
the owner until paid the reward or price of transport-
ation, and he may keep the goods even from if he is
not paid. 4th Ray. 752. 867. 5 Barr. 2826. 5 Bae. 269.
Talk 654 2 N. Rep 64. contra 3 Powl. 4th Ray. 867. not law

And indeed if goods are stolen & delivered by a thief to a com^{er} carrier, he may retain them ag^t the true owner until he is paid the price of transportation, for by law he is obliged to receive & convey all goods tendered. & the law does not oblige him to be so unkind as to demand pay^t before the act done. but allows him to retain as security after. 2 Ray. 867

An Innkeeper also & in the same principle has a right to retain the horse of his guest until the expense occasioned for the horse is paid. & so of other animals, for he is obliged to receive them when he has accommodations. 2 Le. 868. Bull N. B. 25. 3 Bul. 268. Salk 388 8 C. 147. 3 Bac. 185.

And the the horse of it is taken to an Inn by a stranger who perhaps has no title to him & then provided for, the innkeeper may retain him ag^t the true owner until the expenses of the horse are paid. the case is parallel to insured precisely like that of a carrier & founded on the same principle. 1 Yelv. 87. 2 Rep. 128. 179. Esp. Dig. 584.

And the Innkeeper may also retain the person of his guest until the whole bill is paid, for he is a pledge for the debt, the lien upon the horse being only for the expense of the horse for as to that Innkeeper is bailor and in case of bailment a lien exists only in the thing bailed & extends only to receive pay^t for the labor bestowed upon the subject of the bailment.

But the

person is in the nature of a pledge for the whole bill
& no legal process is requisite if the innkeeper would take
advantage of it. He may retain, with his own right
hand & the assistance of his family if he pleases
& shut ^{him} up in any apartment until his expenses
are all paid. This is one of the cases in which
the law allows an individual to enforce his own
remedy. 1 Show. 269. 2 Roll. 85. 3 Bac. 156.

But in this
in all other cases of hire the right is lost by a vol-
untary relinquishment of actual possession to bailor
thus if an innkeeper or carrier carries goods, ^{posⁿ}
to the owner he cannot reclaim, his right is gone for-
ever. For a hire cannot exist without a ^{posⁿ} actual pos-
session. a hire without ^{posⁿ} is a solecism. And if one
abandons voluntarily, his ^{posⁿ} he also loses the hire
actual ^{posⁿ} is of the essence of a hire, so that ^{posⁿ}
if abandoned destroys the hire, this is the principle.
St. a 557. 1 Burr. 493. 4. 1 East. 4. Esq. Dig. 584.

A Taylor
also has a hire upon the materials which he has
brought for baird or baird to be bound upon, as has
all other mechanics in general. So that a Taylor may
quit retain the garment until he is paid for
making it. 8 Co. 147. a. Hob 2. Yelv. 67. 1 Bac. 240

In this latter case however the same reason does not
apply as in case of the innkeeper & carrier for
no mechanic is bound to labour for any man
but in case of this kind the condition is annexed

as it is said in behalf of "trade & commerce" meaning
manufactures & commerce

When however a merchant
is in the habit of trusting to the personal credit of
the bailor, he ought not in a particular instance
to retain or assert this right of detainer without having
given previous notice or information at the time of
receiving the goods. for if he does not give this notice
he is presumed to receive as he had done before, there
is no judicial determination of this point, but it is
laid down by the editor of Bacon. 1 Bac. 240. note.

But an arguist farmer who is a bailee of the 5 clapp
has no time for either of the reasons, which operate
in the case of the common carrier & innkeeper, or in
the case of the mechanic artist in his favour, he
is not bound to receive for his carriage, & the inter-
est of trade & commerce are not at all concerned.
Bull. N. D. 45. Cro. Ch. 2. 1 Bac. 240.

The captain
of a ship has no time upon the ship for his wages and
stores the the mariners have, the reason is, that ac-
cording to the common course of business, he is presumed
to trust to the personal credit of the owner, but the
mariners trust to the ship, the master is employed by
the owner, the mariners by the master who acts as
agent in engaging them & they are entirely unknown
in many cases to the owner. Doug. 97. 131. Abbot on
Shippers 140. 260. La Ray. 632. 576. 12 Mod 240 that
the mariners have a lien upon the ship you

may see Sta. 937. Doug. 101. Abbott. 459.

But when

there is a special agreement on which bailer relies for his compensation the law creates no lien in his favor. This is the case of a person to whom a horse was delivered to be kept & cared it was provided that the owner was to pay on demand a certain sum & determined that that ag^t created him the lien or right of detention. The reason assigned is that when there is such an ag^t the bailer does not rely at all upon the property. The fact shows that he looked to the personal credit of bailor.

I believe however that the true reason is more artificial, it is this that when there is an express ag^t the law cannot imply one, on the maxim *expressum facit tacitum*, altho it may imply one when the parties have not made one. 7 Wall. 42. 12 W. 56. 5 Bac. 371. Esp. Dig. 585 h.

Go also

a factor or any commercial agent is not to have a lien upon the goods of his principal in his actual possession for the balance of account between them. There are a variety of rules relating to mercantile agents for which I refer you to "Master & Lewis" 3 J. Rep. 119. Com. Dig. Merchant B. 226 & 254. 1 Burr. 494. 20 Bl. Rep. 115 d.

These are the principal bailors who are entitled to a lien or a right to retain the goods until the debt or duty is paid. It is not however to be understood, that no others than these I have mentioned have a right to hold property at all ag^t the bailor. Most undoubtedly, a hirer has a right to hold until the

object is accomplished or the time expired for which the property was bailed. till that time the bailor has no more right to take than a third person and the rule is the same in relation to a borrower. altho the bailment is gratuitous.

Thus if I engage gratuitously I am not bound by this ex^d. contract. but if I give prop^y I cannot re-take until the object is accomplished or time expired without subjecting myself. No doubt a hiree may return for the stipulated time or purpose, but this is not a hire, he has a special property, that is not to incur a debt or duty, which makes a hire a particular kind of special property. Yel. 172. 1 Roll. Ab. 128. 1 Bac. 240.

Thus far as to the right of detention by bailor, the next subject to be considered and that of far the most practical importance is

How far the rights of strangers may be affected by bailments.

Disputes do not often arise between bailor & bailor but the rights of the creditors of the bailor & purchasers under him are often disputed.

Before we enter into the particular examination of the subject there are a few introductory rules to be laid down.

On the first rule it is said, but I think incorrectly, that if one lends as his own the property of another, the bailor

must return it to the bailor and not to the true owner,
i.e. to the person of whom he received it without regard
to the true owner, because it is said that the bailor
cannot judge between the bailor & the true
owner. But this rule as you will see goes further
than the reason. 1 Roll 606. 7. 1 Bac. 237 242.

Cap. 11.

And that this rule means nothing more, & if it does
it means more than is law, than that the bailor
will be justified if he delivers to the bailor, and
that he may thus discharge himself of the claims
of the true owner. The reason assigned goes no further.
It would be extremely hard to compel him to judge at
his peril for he might thus be subjected to a loss when
the rule was introduced for his protection & the law will
not subject him if he delivers to the bailor. This ought to
be the entire principle.

It would be unjust to assist the owner
of his property who stole it may reclaim as pleasure.
Again how can the bailor confer a right a right which
he has not withheld the property from the owner &
that too when the bailor knows the facts.

But it is said
afterwards in Roll. from whence the orig^l rule is taken,
that if bailor delivers the property to the bailor before
or pending an action br^g ag^t himself by the true
owner, it will bar the action. This protects the honest
bailor & does not deprive the true owner of his right. It
shows, that the owner may recover of the Holder. 1 Roll 607.
Fitz. 137. 1 Bac. 242.

In case of this sort when there is a dispute as to the title of property bailed if the owner does not exhibit sufficient evidence of ownership the bailor ought not on principle to be subjected but if sufficient evidence were shown I trust he would be liable unless he discharged himself as above by delivery to bailor.
24 May. 867.

The rule laid down by L^d Stott is, that if goods owned by A are stolen by B & delivered to a common carrier, he may retain them against the true owner until paid for the transportation but no longer.

Now if the rule from Rolle is correct the one from Stott is entirely negative & the common carrier would be bound to deliver to deliver them to the thief altho he knew the facts
L^d Ray. 811. Esp Dig. 599.

Again according to the text of Rolle if the bailor in a case of this kind dies & his Ex^r comes into possession of the goods, the Ex^r must deliver to the true owner at his peril and not to the bailor. i.e. he will not be discharged by delivering to him from ^{his intestator} received them as ag^t the claims of the true owner.

Because it is said the Ex^r having acquired possession by law by transmission from intestator he must deliver to him who in law is the owner. This rule seems to place a case somewhat hard ag^t the Ex^r his intestator might have delivered to the bailor

I discharged himself from the claims of the true owner, because he could not be compelled to judge between the claimants. An Ex^r does not of course possess a better opportunity of judging correctly and in most cases not as good. There is no decision contradicting Holt's rule but I am even that it cannot be law; it appears to be arbitrary and founded on reasoning as technical and artificial as can be supposed. I suppose that the Ex^r stands in principle precisely in the place of his tutor & may discharge himself in the same way. 1 Roll. 607. 1 Bac. 237.

You are now to consider the rights of those persons who purchase under a bailor and the rights of creditors who lay upon the goods supposing them to be his. Cases often occur in which the following rules will be found useful.

I would observe that by the stat. 21 Geo. 1 which Act is to be in affirmation of the C. L. if a person becoming a bankrupt has in his possession order & disposition the goods of another by his consent they are liable for the debts of the bankrupt bailor & the creditors may take them as his. 1 Co. 114 166. 1 B. & P. 87. Doug. 303 & 7 Rep. 82 7 ib. 228.

This statute you will observe relates to bailors who become bankrupts, or to the possession of the goods of another by a person becoming a bankrupt while the goods are in his possession but not to cases in which the bailor

becomes a bankrupt 2 c. 4. Rep. 67.

This statute extends as well to goods not right belonging to bankrupt, but bailed to him as to those which did right belong to him and were sold by him without a transfer of possession, i.e. it includes not only the case of goods sold & not transferred in possession but also those not bailed to him. Comp. 232. 1 B. & P. 82. Esp. Dig. 567.

And it would have been sufficient to say that goods originally belonging to bankrupt & by him sold but permitted to remain in his possession the rule was as strong in favour of his creditors before the statute as it is now. For by 3 L. and the Stat 13 Eli. it was said that a sale of personal chattels the vendor continuing in possession was fraudulent as against his creditors. i.e. it is a badge of fraud or prima facie evidence of it, which might however be rebutted. Comp. 233. 3 Co. 81. 2 B. & P. 587. 595. 7th. 71.

The creditors of the bankrupt bailed are allowed under the Stat. 21 J. 1. to come upon the goods in his possession not strictly on the ground of ^{supposed} fraud between the bailor & bailee, but by reason of the false credit given him by the possession of these goods for his credit might have been & usually is, given or enlarged from his being the ostensible owner, instead of the absolute ownership which gives him credit with one another, it is on this ground that creditors are sought to be allowed to take them. 1 V. 364 368. 3 J. 342. Esp. Dig. 566.

The bailor rebutting any presumption of actual fraud between himself & bailor, is of no avail as between himself & the bailor's creditors, their claim is not founded on any presumption of fraud but upon this false credit which the ostensible ownership gave to the bailor. 1 Vez. 365.

This statute seems to be founded upon & in affirmance of the great principle of the C. L. that when one of two innocent persons must suffer by the act of a third, he who occasioned or enabled the third to cause the loss, shall suffer it rather than the other.

The bailor in this case by permitting the bailor to act as ostensible owner has given him a general credit, the question whether the credit given in a particular instance was thus acquired was never made, it is sufficient that the property deceived the public, and thus the bailor enabled the bailor to occasion the loss, he must therefore be liable.

This is clearly the rule of the C. L. & of Equity. 3 C. Rep. 40.

If the stat of 1st is in affirmance of the C. L. it follows that the stat and the construction it has received in Eng. are of as much importance here as there.

It is not to be understood that this stat extends to goods in the possession of the bankrupt which he holds in the right of another, e.g. as guardian, or husband or executor, for the law in such cases gives him possession & the party in whose right the property cannot prevent it. It is not in consequence of any delegated right of possession

that they hold, so it is not the fault or folly of the owner or
bailor that occasions the loss. of course the case does not
come within the statute. 1 Cthk 159. 3 B. & M. 187. note.
3 T. Rep. 618.

The statute however does extend as well to mort-
gages of goods as to absolute sales, when the creditor will
hold to the exclusion of the mortgagor who is left in
possession. Robt. Tr. Con. 549 to 557. 1 Cthk. 165. 1 Vy. 348.
1 Wils. 260. Esq. Dig 565.

You will observe however that
the same rule does not hold in relation to mortgages of
land. for the mortgagor being in the possession of
land is no evidence of his legal title. The title of
land may always be traced, and if the creditor does
not choose to examine the title deeds it is his own fault
the act of ⁸⁰ extends only to mortgages of personal
chattels.

whether does this statute extend to the sale of
a ship at sea. for in this case immediate possession
cannot be given. Suppose a mortgage by a bill of sale
a ship at sea to B. immediate possession by B
is impossible, and it is constructively in possession
by his agents the master & crew, still the stat-
ute does not reach the case and the mortgagee B
will hold to the exclusion of the creditor of A the
bankrupt because immediate possession cannot be
taken.

B must however, take possession immediately on
her arrival and if he does not if he suffers her to
remain in the hands of the vendor or mortgagors possession, it

will continue his false credit & thus come within
the spirit & operation of the statute. 1 Attk 160.
1 Ky. 354. 361. 366. 2 T Rep 462. 285. 491. Esp. Dig. 567.

And there are other cases too in which an actual man-
ual delivery is dispensed with, i.e. is not considered
necessary to enable the vendor to hold against the
vendor's creditors. There are cases in which symbol-
ical deliveries are held sufficient.

Thus if a store of goods
are sold by a bill of sale and the key delivered
to the purchaser, it is sufficient as it gives him
the control over the subject, so that if the vendor
afterwards become bankrupt, the vendor will hold
to the exclusion of the vendor's creditors. 7 T. Rep. 71.
2 Stra. 955. Esp. Dig. 577.

It also to bring a case within
the statute the goods must be possessed by the bankrupt bai-
lee as his own goods are, i.e. he must not only be in the
possession but in the order & disposition of them to use
the language of the statute. That is he must
use in some such way as to appear the visible owner
to the world otherwise the possession would give him
no false credit.

Thus a box deposited with a deponent,
shut up out of sight so as not to appear his or not to
appear at all indeed. This would not be liable for
the debts of the bankrupt deponent.

But if a purchaser
an assortment of goods consisting to remain a

dormant owner, suffers B to take the goods & to sell, manage traffic & treat as his own, on a kind of contract, about in his own name, the case is different. The public supposes that the goods belong to B he does not call himself the elect. & at but contracts in his own name, these goods then give B a false credit & they are liable to his creditors.

But on the other hand if one lends another a horse to ride in as a journey, the creditors cannot take it. for the prop^r for such purposes carries no evidence of ownership, and if the rule were otherwise it would be extremely inconvenient, as bankrupts could not go to work. But the great decisive principle in these kind of cases is that the bailor gets no false credit arising from the use by such possession. Corp 233. 1 Attk. 185. 3 T. Rep. 376. Exp. Dig. 507. 570

There also is temporary possession by a person becoming bankrupt for a particular special and temporary purpose does not bring the case within the statute. Thus A lodges goods with B to keep until he could have an opportunity to send for them, or when there is a storm he overpays or takes a ship or an express carrier - and in mean time B becomes bankrupt his creditors cannot hold for them as plainly cannot be contemplated by the statute, if they were so near as to be such as if he goods were in his own hands. 1 Attk. 185. 1 T. Rep. 202. Exp. Dig. 504.

And a bankrupt bailor must appear in all respects to be the owner, to bring the case within the statute, for if from the nature of his business the presumption of his ownership is excluded, the bailor will hold to the exclusion of the bailor's creditors.

Thus it is a factor in the possession of C's goods, so far as his acts go he appears to own them as his own & to have the whole control. Yet as he is known to be a factor if he afterwards become a bankrupt his creditors could take the goods, the principal or bailor will hold for the bailor being thus known, could acquire no false credit by the possession. 1 B & P. 82. 1 P. M. 318 3 ib. 185. Esp. Dig. 570

Thus far I have treated of the rights of the creditors of the bailor, and have said further above in relation to purchasers that

The purchaser under a bailor who purchases the goods to belong to him will hold against the bailor precisely like the creditor of bailor, i. e. according to the distinction already taken 2 B & P. 602. 5.

In cases where goods have been sold & committed by vendor to remain in possession of vendor who becomes insolvent, the Stat of 27 Eliz. provides that the subsequent purchaser shall hold in exclusion of the first purchaser. The Stat 21st Stat 1 affects the same purpose & extends also to cases in which the goods have not been sold.

The C & L however would have attained all the ends

of both the statutes. At any rate the st. of Ill. has been consid-
ered and making of the C.L. in Com. I sincerely think
that the st. of Ill. is of the same character see. Comp. 434

In common case of bailment (when the bailor is not in
the order & disposition of the goods & is not of course the or-
iginal owner, or when he does not become bankrupt), the
general rule is, that the true owner, that is, the bailor
may recover against the purchaser under the bailor
or any subsequent purchaser, or a creditor who levies
on them as bailors unless the sale was in market overt,
So against any person into whose hands they may otherwise
have fallen however honestly he may have obtained
them. the maxim being caveat emptor.

Here you perceive there is no false credit given, for although
goods are in the actual possession of the bailor, yet he has
not the "order & disposition" of them, and for this reason
the purchaser cannot hold although the bailor should
trust the property in such a manner as to induce
the belief that he was the real owner. The sale is
a breach of trust & can convey no title.

Thus et alia

horse to B to ride 5 or 10 miles. B in breach of trust sells
the horse to C. when on his journey. C cannot hold agt.
the bailor, for the circumstance of B's riding the
horse is no evidence of ownership. the fact of letting
him use horse & carriage is a fact of daily occur-
ance. And if B should sell to D & D to E. &c. &c. it is
immaterial how numerous may have been the sales

or honest the indiscreet purchaser, the rule is the same
the purchaser must lose his money, unless he can recover
it of the seller, or the horse has been sold in market
overt. for you observe that the bailor has not the order
& disposition of the horse. 1 Wils. 8. 2 Stra. 1187. 3 Atk. 44
Lalk 283. Esp. Dig. 579.

And in another case which is the
great leading one in the Eng. reports, where it supposed
a sealed bag of jewels with a jeweller & he in breach of
trust broke the seal & pawned the jewels, the question arose
whether the pawnbroker could hold against the true owner
who brot. trover against him. & the court held
unanimously that he could not. It was solemnly
adjudged that altho in the possession yet the jeweller
was not in the order & disposition of the jewels. Statop
vs Hoare. 3 Atk. 44. 1 Wils. 8

When bailor has been
in possession for some considerable time, but not in the
order & disposition of the goods with the owner con-
sent the rule is the same, it has however been a
good deal questioned. 3 T. Rep. 376. 11 id. 640.

But there is an exception to the genl. rule when the prop-
erty bailed is money, i.e. specie bank bills or whatever
constitute the currency of the country in case of this
kind a regular transfer by the bailor to a bona fide re-
ceiver, i.e. to a person ignorant of bailor's right will bind
the property, tho it be not in market overt. Lalk. 186.
3 Burr. 1516. 1 Pl. Rep. 418. Esp. Dig. 39. 579.

12
Thus if a de.

lives or deposits a sum of money with B for safe keeping for a long or a short period and B in breach of trust transfers it to another who does not know of A's ownership. the receiver will hold to the decision of A. Indeed the rule would be the same if B had stolen the money.

The reason assigned by Lord Hardwicke for this exception is that money has no ear mark, but this reason will not hold in the case of bank notes any more than it will in the case of official stamps, and it is not the true reason, although it is a quaint one, the truth is that the rule originated in commercial policy, its currency is that is reason enough. were it otherwise no one would be safe in the present degenerate state of the world if every one was obliged to enquire into the title of the holder of money before he received it commerce would be at a stand.

I have observed to you that we have no such stat as that of 21 Jac. 1. but the rule adopted by our courts is conformable to it. I observe that our courts consider it as C.L. & Lombard's property. Both in Eng & Am. for I take the rule to be the same in both: a creditor of the bailor who seizes the property as his, or a purchaser under a bailor will not hold the property in any case unless the bailor is insolvent. The reason is that if the bailor is solvent the purchaser has his remedy on the implied warranty & the creditor has it in his power to levy on other property.

The reason why the purch^r or cred^r can hold in any case is the great principle of C.L. before recited as the foundation of the stat that where one of two persons

must suffer by the act of a third, the one who occasioned the
thing to cause the loss must bear the loss. And unless
the bailor is a bankrupt there is no false credit given.
It is therefore indispensable under the Stat and at C.L.
that the bailor be insolvent to entitle his end- or
purchaser to hold a thing, there is plainly no occasion
to divest the bailor of his title. 3 Attk 244.

And even
when the bailor is insolvent his purchaser or creditor
will not hold against the bailor, unless the possession
was sham, such as to give him a false credit. This
rule is founded in the words of the statute. bailor must
have been in the "order & disposition" of the property,
by which is meant that he must appear the ostensible
owner of it. 1 B & P. 82. 88. 648. Doug. 306. 7 T. Rep. 67.
237. 1 Vin. 243. 1 Attk 185.

And further the creditor of
an insolvent bailor will not hold against the bailor
unless the terms of the bailment were such as to entitle
the bailee to the possession as of his own, i.e. he must
appear the ostensible owner otherwise he has not the
order & disposition of the goods by the consent of the
bailor. the consent is indispensable. Thus in the case
of Hartot & Hoare. the jeweler broke the sealed bag
& thus became the apparent owner, but breaking the
real was a breach of trust, and the jeweler did not
appear the ostensible owner nor had he the order
& disposition of the goods by the consent of the owner,
he could not so appear by the terms of the bailment
any more than a thief could. 3 Attk 244. Feb. 185.

The question of governing the relative rights of a bailor on the one hand and of the creditors of the bailor or purchaser under him have been already explained yet a third one of frequent application I will state a few more examples.

To bring a case within the statute the bailor must not only be in possession but he must have the order & disposition of the goods. i.e. he must appear to the world the true owner of the goods & this is also the C.L. rule.

So if I purchase goods of B I have them with him until he can remove them. If B becomes insolvent they will not go to his creditors.

So if a traveller leaves his horse & leaves him with a farrier to be shod or his carriage & leave it with a smith for repairs, and in the mean time the bailor becomes bankrupt there is no pretence that the creditors can hold against the bailor.

And it is a general rule that where there is given to the bailor a temporary possession for a particular special purpose or temporary purpose, the creditors of the bailor on his becoming bankrupt cannot hold against the bailor. Doug. 603. 10th 185. to 187. 8th. Dig. 567.

Now the circumstances under which one man may be in the possession of the goods of another in the character of bailor are indefinitely varied and numerous. There are many cases in which a credulous man would trust to the verities of ownership when a cautious prudent man would not. I have explained the criterion as far as I was able.

Swiss state another sample which occurred in this state
a merchant drove a driver and a driver to take his
cattle to N. York. The driver left the main road & sold
the cattle to some incautious purchasers whereupon
the owner claimed the cattle & recovered them in an ac^t
of trover. The mere fact of driving was no evidence of
ownership. the truth is owners but seldom drive their
cattle to market. In many cases might be stated
that it would be superfluous.

When goods are bailed for hire
to be used for a certain time by bailor it has been a most
question whether the bailor creditors could take his interest
in the thing bailed on execution. The rule is that he
a year of use of B for 6 months. Here A has a pecuniary
interest for that time. Can his creditors take by Ex^{or} his
special interest? Paynter appears to affirm this in his
argument when he says that the creditors would be enti-
tled to the beneficial use of the property during the time.

What I conceive that the creditors cannot take the goods
is upon the ground that the bailment for a personal
 chattel is always a fiduciary contract. I think that
in my observations upon the subject of Leases I observed
by that a lessee cannot assign the lease until
the property becomes absolute in him. can then credi-
tors of a hirer take his interest in the thing hired? if he can
of one should hire a horse to go to Stamford to stay his creditors
might take him from him and that too when the hirer
himself could not assign the chattel.

I repeat the contract

is founded on personal confidence & confers no right to the bailor to transfer. that was not the intention. If the bailor can lawfully assign he would not be answerable for subsequent bailor's conduct and a stranger would become the arbitrary disposer of another's interest.

It appears to be going to far then to say that a bailor can assign personal chattels a fortiori than his creditors cannot take them for ^{2d} King's debt. 7 T. Rep. 11. That a bailor can not assign in 5 T. Rep. 604. 7 East. 6.

The truth is however, that the opinion of ^{2d} King taken secundum subjectam materiam is not at all repugnant to the principle I have laid down. The case was a question as to the furniture bailed with a house, and as the time might be taken the goods might doubtless be taken with it, but see 2 Bac. 382. Com Dig Ex. C. 4. Salk 404. La Ray. 795. 913. 915. 16.

Thus far of the relative rights of the bailor on one hand and of the creditors & purchasers under the bailor on the other we are now to enquire.

To what actions the bailor & bailee may be respectively entitled.

It is a general rule laid down in the books as universal, that the bailor as he has a general property in the goods may recover in trespass or in trover or any proper action, against any stranger who takes away the goods or impairs them while in bailor's possession. I think to show that this rule is not universal 5 Bac 164. 260 Lat. 314. 1 Roll. 4. 2 Bul. 268. 3 Rees Hist. 392.

Thus if A deposits goods with B & C injures or takes them away, the bailor may maintain trover or trespass or any action the case may require ag^t C. for although the bailor has not the actual possession, yet in things personal gent^l property draws after it what is called a constructive possession or a possession in law, which is as effectual in law to support trespass or trover as actual possession. 2. Roll. 569. 1 Sid. 238.

I would observe that a right of present possession in any one amounts to a constructive possession or a possession in law unless some other person is in actual possession under colour of title i.e. adverse title; a constructive possession & possession in law being the same thing.

Thus in the case above A has a right of present possession he may even turn and the delivery at any time. B is not in actual possession under colour of adverse title A therefore has a constructive possession and one or the other is indisputably entitled to an action on injury done. This I take to be the true construction & on this principle the bailor may recover in the case stated.

So if a watch be lodged with a goldsmith to be repaired & it be taken away, the bailor may maintain trespass or trover for he has a right to compel him and the delivery.

Suppose goods bailed to be used 6 months by bailor & hire to be paid him. If within 6 months within the 6 months they are taken away, can the bailor maintain trespass or trover for them ag^t wrong done? 3 T. Rep. 289. 7 T. Rep. 9. 1 T. Rep. 280. Esq. Dec. 383. 8 Johns. 532

1 Buls. 68. Esq. Dig. 576. See next questions. -

What the bailor may maintain an immediate action there is no doubt. Whether bailor can maintain any if any what? is the question. -

But if goods are wrongfully taken from a depository or injured while in his possession, the bailor may doubtless maintain an action immediately for he has a constructive propⁿ which is a right of present possession and this rule holds thrust in all cases in which the bailment is constructive and at pleasure of bailor for then he of course has a right of present propⁿ 5 Bac. 164. 260. Latet 214. 1 Roll. 4. 3 Rev. Hist. Eng. law. 392. 2 Buls. 268.

It is said in the books that if a bailor gives goods to a stranger the bailor cannot maintain trespass against the stranger or donee nor in the first instance trover, that is he cannot maintain either until demand made when a refusal amounts to conversion, the right taking having been lawful. 5 Bac. 164. 261 1 Roll. 606. 7. 1 Bac. 237.

But according to a later case this doctrine would appear questionable; for the delivery of the goods would itself be a breach of trust. In the case before cited of the factors having the goods of his principal, it was decided that the principal might maintain an actⁿ ag^t either the factor or pawnor without traversing at all, for it was a breach of trust or misfeasance amounting to conversion. 7 East, 5.

And yet it has been determined that if goods are given to a stranger by a bailor, and taken or lost for them in the first instance it will not lie, and still I conceive that this is a more flagrant breach of trust than the pawning. These decisions cannot be reconciled & it would seem that this latter one relating to the gift is exploded.

At any rate after demand made & sufficient evidence of ownership exhibited on refusal to deliver by bailor, donee bailor may unquestionably maintain trover. 1 Bac. 242. 1 Roll. 606. 2 Ld. Ray. 867. 1 Root 58.

So also it is agreed that most bailors & as I conceive all bailors without exception may maintain trespass or trover or any other proper action the case may require, against wrong doers for the full value of the goods. E.g. a common carrier, special carrier, agister, farmer, pawnor, lender or borrower, there no doubt have the right for the bailor in each case, as between himself & a stranger may be considered as the true owner & is to declare such in his action, for he has a special interest or a right of property which empowers it & he may therefore maintain the action as well as if he were the true owner. 5 Bac. 165. 262. 2 Ld. Ray. 276. Bull at P. 33. Rydington 39. 2 Ld. Ray. 143. 1 Mod. 31.

On the same principle the finder of goods may maintain trespass or trover against a stranger who injures or wrongfully takes them. Thus in the case of *King v. ...*

Having found a jewel went to a jeweller to know the value, who discovered the boy & purchased it for a mere song. The boy then by his next friend brought it back and it was sustained because the boy came lawfully into possession by finding, and he who has the lawful possession has a right to retain the goods against all but the true owner. Bull. et P. 33. Stra. 505. 1 Bac. 346. Esp. Dig. 575 577.

Can it then be said that a depository or mandatary who holds by the express consent of the bailor has a less interest than a finder who may never merely because he has a right of possession. And have they a less interest in a more slender title to support an action?

But it

is said that the ground of every bailor's right to sue for the full value of the goods in any action is his own liability over to the bailor. And therefore it is said that a depository or mandatary under a full acceptance who is liable only for fraud, cannot maintain any action. This appears to have been the opinion of L^d Coke & has been adopted since in most of the abridgements. Co. Lit. 89. Lid. 438. 13 Co 69. 5 Bac 164 5. 262.

Now in the first place with regard to this reason, it is not true in point of principle, i.e. the actual or possible liability of the bailor over to the bailor is not the ground of his action. And if it were the ground of his right of action, still he would have a right to recover as any other bailor has.

For first every bailor has a special property in the

thing bailed? when he is liable over to the bailor or not is not material. it is his special interest his right-
ful actual possession which gives him his right of ac-
tion as can be shown by every analogy in the
law. 4 T. Rep. 392. 398. Jones 112. 1 Bac 240. These
authorities mean more which might be added than that
every bailor has a special interest: & that, that united
with the lawful possession give him the right of
action. see again. 1 Bac. 346. 5 id 262. 7 T. Rep. 396
to 398. Esp. Reg. 575. 574. Stra 505.

In the last cited
very strange is the case of the finder than the language
of King is emphatical. he thus says that a finder
has such a property as will enable him to keep the
thing against all but the true owner & consequently
he may maintain an action. This special interest which is the
ground of his action is his only as he has the lawful possession.

But there are other analogies which are very strong in fa-
vour of my opinion. By the statute of Winchester commonly
called the statute of "murbery" it is held that a man
servant may maintain an action against the
husband in which he is robbed of his man & his goods
but the authorities are all agreed that the servant
is not liable over to his master. so that in the
liability is certainly not the ground of his right
of action. 4 Mod 282. Com. Dig. 654. Comb. 263. 12
Mod. 54.

It is also well noted that a man servant may
have an action of robbery. this is a criminal process

affair of felony. Yet he is not liable over to his master unless
he is himself guilty of larceny 13 C. 69. 2 Larceny 380.
Eam 129. 138.

So also it has very recently been settled in the
C.P. that an unauthenticated bankrupt having ac-
quired goods since his bankruptcy may maintain
an action of trover for the goods against a wrongdoer.
For although all his property before would go to the assign-
ees yet the bankrupt holds which he has was deemed a
sufficient foundation for the action. 1 B & P. 424

Again where a house leased had been blown down by tem-
pest it was determined that the lessee could maintain
trover for the timber or the component parts of the
house after they were separated by the tempest the
general property was in the reversioner. yet by the storm the
house was converted into a chattel interest & the lessee
into a bailee. Now there is a very strong case, the ten-
ant or rather lessee was not liable for the loss oc-
casioned by the tempest nor was he under any ob-
ligation to defend or keep the timber yet he sus-
tained the action. Bull et al. 33 W. 578. 677.

Indeed it is to be well settled that real property
or that property which is entitled in leased property is
sufficient to found the action of trover or trespass
against wrongdoers. This rule is laid down in so many
words 20 C. 397.

It seems clear then that there is no neces-
sity of resorting to the question of lessee's liability over.

in order to determine whether he can recover in trover or
trover agt. the wrong doer. The true ground then is, as
I think I have demonstrated, that as against a wrong
doer, besides all else but the true owner the bailor is in
law the owner and it is not for the wrong doer to say
that he is not.

2^d. Granting that the bailor's right of
action is founded on his possible liability over to the bailor,
still a depository is as much entitled to an action as any other
bailor notwithstanding. A depository is certainly account-
able to bailor and may be actually subjected. Now
when the "bailor's liability over" is spoken of we are to
understand by it nothing more than his possible li-
ability. For his actual liability in any given case can
not be tried in an action between the bailor & wrong
doer & if it could it would be futile for it would not
be binding on the bailor in any event nor on the
bailor in the other. Their relative rights I repeat
cannot be tried in an action brought by bailor
against the wrong doer. All bailors or a particular class
are not always liable, a depository or a mandatary may
be liable certainly. & it is equally certain that other bai-
lors may not be liable. It is very clear therefore that
on this ground the right of a depository or manda-
tary is precisely like that of all other bailors.

Again
the policy of the law & gent. expediency require that
every bailor whatever should have a right to sue a wrong doer
wrong doer. For it does not seem reasonable that the bailor and
bailor reside at a distance from each other, sometimes

on different continents. In such cases if a wrong done should take the goods from bailor possession shall it be necessary to send across the world to procure a power of attorney from bailor to sue him.

^{up} The next rule in the title might be added in aid of my argument. viz. If a bailor deliver goods to a stranger it is an agreed point that the stranger may maintain an action against any one who injures or takes them away. Yet what is he but a depositary? the goods are delivered to him for mere custody. This then comes directly in the teeth of the rule I have been entertaining against. 5 Bac. 266. 1 ib. 242. Roll 607.

It is an agreed point that an auctioneer or broker may maintain an action in his own name on the contract made for goods sold by him to a purchaser and this rule holds altho the purchaser who owns the goods. As a general rule ^{where} a servant makes a contract in the name of the master the master & not the servant must maintain the action. *W Chitty affirms* as the reason of this diversity, that the auctioneer has an interest by way of commission in the goods sold. I suppose however that it is because he makes the contract in his own name. 1 Chit Pl. 5. 1 Kim Pl. 31. 2 ib. 541. 1 Com. Con. 254

A fortiori then a factor may maintain an action against any one who purchases under him both reasons undoubtedly exist. So also a shipmaster may maintain an action for freight. These agents contract in their own name and must for make

ty be allowed to sue in their own name for their contracts
& their purchasers generally in foreign countries.

The rule is the same as to a broker. the substantial
reason in all these cases I take to be that the agent
contracts in his own name. see "Master & Servant" Buller
N. P. 130. 14 W. R. 82.

Thus you perceive that under certain
circumstances either bailor or bailee may maintain
an action against the wrongdoer for the full value,
that sometimes either bailor or bailee may bring such
an action tho' not both, yet it is not always that the
bailor may have an action, and the rule thus qual-
ified holds under whatever description the case may fall.

Tho' the bailor & bailee may both have a right to
sue a stranger. yet there can be eventually but one
recovery for the full value. When then the bailor brings
his action in trespass or trover & recovers the whole val-
ue, the bailee cannot recover in either of those actions
for the full value. But if the bailee has recovered
the bailor cannot recover at all.

The rule you see
is not precisely alike in both cases the difference is
that after a recovery by bailor of the full value
the bailee in a suff^t action may recover for his
special damage but not the full value. 13 C.
69. 5 Bae. 165. 263.

The rule laid down in Buller is
that if both have an action pending at the same time
he who first recovers ousts the other of his action. & so

But the more correct rule to be that he who first commences his action for the full value will sue the other of his action of the same nature, for by commencing the action the party attacks in himself a right of recovery which precludes the other party and this rule appears agreeable to an analogy. see however v. Hall 564.

Thus when a servant is robbed the servant or the master may have an appeal " & he that begins first shall recover & prevent the other of his action." 3 Bac. 559. Latet 127.

And if the bailor has recovered satisfaction of the wrong done he clearly cannot have an action against the bailor even when the bailor has been in fault as by voluntarily exposing the goods to injury or loss for the law allows but a satisfaction for the same thing. Eg. the C. L. allows of that in recovery in any case. 2 Ray 1217. Cro. Ch. 24. or 35. 3 Lev. 124. Salk 11. N. P. 68. Esp. Dig. 317.

The rule just laid down is certainly correct but I think it might have been laid down more strongly & made more extensive. for if a bailor first commences an action against the stranger or wrong doer he is so far from discharging the bailor or in other words waives his remedy against the bailor. I find no authority or absolute necessity for this but if the bailor by commencing his suit can preclude the bailor from having one against the wrong doer, it certainly ought to be the rule. for it would be extremely

unreasonable to expose the bailor to an action at the suit of the bailee when the bailor has himself deprived the bailee of his indemnity, or by commencing & discontinuing a suit against the wrong doer when perhaps too he has become a bankrupt.

Besides it is supported by analogy. Thus in a case of rescue. The Plaintiff may sue either the Sheriff or the rescuer at his election, but if he commences an action against the rescuer the Sheriff is discharged. The situation of Sheriff in this case is very like that of bailee he is the keeper of a pledge viz. the Sheriff's body and the rule it would seem should be the same in relation to loath. This rule is inferable from authorities & is laid down expressly by Eschimaux Esp. Dig. 610-612. Hut. 98. Cro. Ch. 77. 109.

And there are many analogous cases in which the party having an election of two remedies must abide by the one he chooses & not abandon that for another for example 5 Bac. 179. Salk 248. 12 Allod. 663. 4.

On the other hand if the bailee first commences his action for the full value against the wrong doer, he makes himself liable to the bailor at all events. This rule however presupposes that he who first commences such an action also facts into the other of his action of a similar nature, and follows clearly from it for if the bailor takes the remedy from the bailee he ought at all events to be liable himself.

But altho the bailor first

commences an action & even though he has recovered yet the bailor may have a special action on the case for his special damage if he has sustained.

Now then in many cases in which a bailor can and in many where he cannot sustain special damage, ^{a mandatory a depository cannot receive sp. damage} by the injury of the article bailed or by being deprived of it in as much as they receive no benefit from the possession.

But not only a bailee but a hire or borrower may sustain great special damage in that way and they may maintain an action for it distinct from the action by the bailor to recover the full value & as before observed this action by bailor is not prevented by a former recovery by the bailor of the full value. There is no precise case of the kind in the books, but the principle is very clear for it is well established that where one does a wrong act involving what is called a *damnum injuria* to another the sufferer may have an action for it i.e. for the special damage. 3 T. Rep. 65.

If the bailor himself takes the property wrongfully from the bailor, as before the time agreed upon he repaid or the purpose accomplished, the bailor may have a special ^{act} on the case against him, for he sustains an injury in consequence of a wrong act done in violation of the bailment.

I apprehend however that he cannot maintain trespass or trover against the bailor for these are actions to recover the full value of the goods.

the contrary is laid down by Coke and adopted by many
writers since. 5 Bac. 185. 266. Esp. Dig. 401. 13 Co. 69.

Now the reason why he cannot maintain trespass or trover
is that his special property is the ground of his action &
his special loss the measure of his damages. It is true that
this special property gives the bailor a right of action ag^t
third persons for the full value & ag^t them only
as I conceive. as to such he is the true owner & they are
not competent to deny it. as to them he has the gen^l prop-
erty, but not as to the bailor. And there is certainly
no propriety in allowing the bailor an action ag^t
the bailor to recover the full value. That this is
the bailor's relation to strangers see *Stea*. 505. Esp.
Dig. 575. 1 Ky. 359. 361.

Now as between the bailor
& bailee the latter has a special property entitling
him to the custody & use and this is the extent of
the bailor's right ag^t the bailor, but as against
wrong doers he is the gen^l owner & recovers the full
value in behalf of the bailor.

According to Coke's
rule the bailor may bring trespass or trover & the
ownership of def^t bailor will go in mitigation of
damages. But I conceive that in all cases in which
the full value is sued for the Plff is entitled *primo facie*
to an action to recover the whole value.

So if goods taken
are returned it will go in mitigation of damages & so
in all cases when the damages can be mitigated by any

thing is past fact.

But in the present case the bailor had no such right originally, or at the time of injury done & thus it is which distinguishes it from those cases.

But there are still stronger reasons why bailor cannot bring trespass or trover viz. that in an action ag^t bailor ag^t bailor the real value of the property furnishes no rule of damages even presumptive. The special damage may be much greater than the value, why then should he bring an action in which the real value is prima facie the rule of damages or measure?

Again the injury may be less than the full value of the goods in such cases D. Carter says the damages may be mitigated down to the actual injury. if so it is at any rate a very substantial & incongruous mode of recovery.

The reason why the bailor sues for the full value in any case is that he may recover for the benefit of bailor but in this case the bailor has secured himself by taking prop^y thus also injured the bailor, so that in this case the bailor does not sue for the benefit of bailor. I make these observations because I think that D^r Carter's rule is not correct, still however it may be & I do not now consider about this. I think it clearly opposed to principles.

If a bailor delivers property to another in violation of bailor's orders, he is ipso facto guilty of conversion, a misfeasance amounting to it & therefore

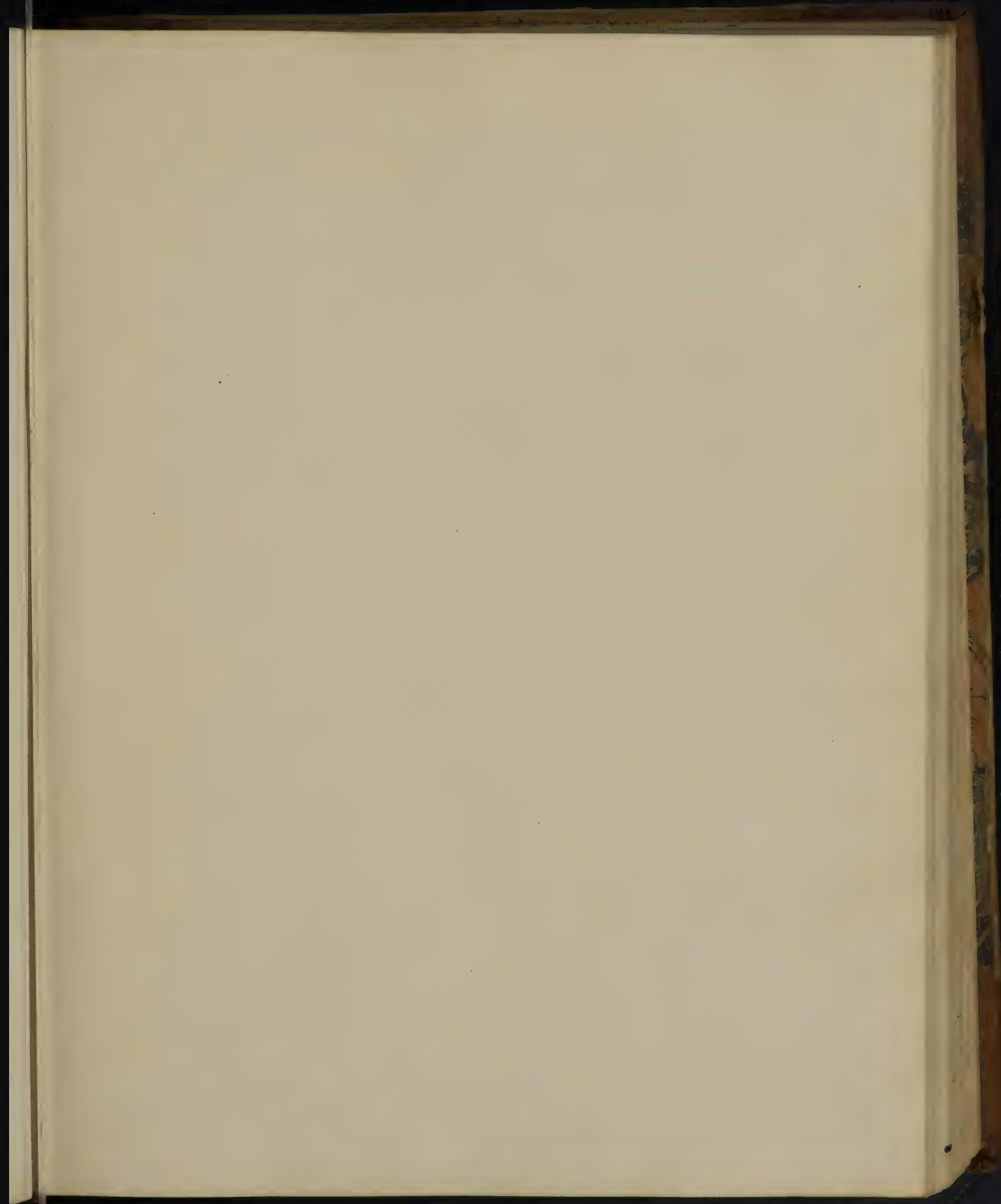
will lie without demand. It is well known
but for an unlawful taking, user & detainer, this
is a case of unlawful user. 4 T. Rep. 260. Esp
Dig. 581.

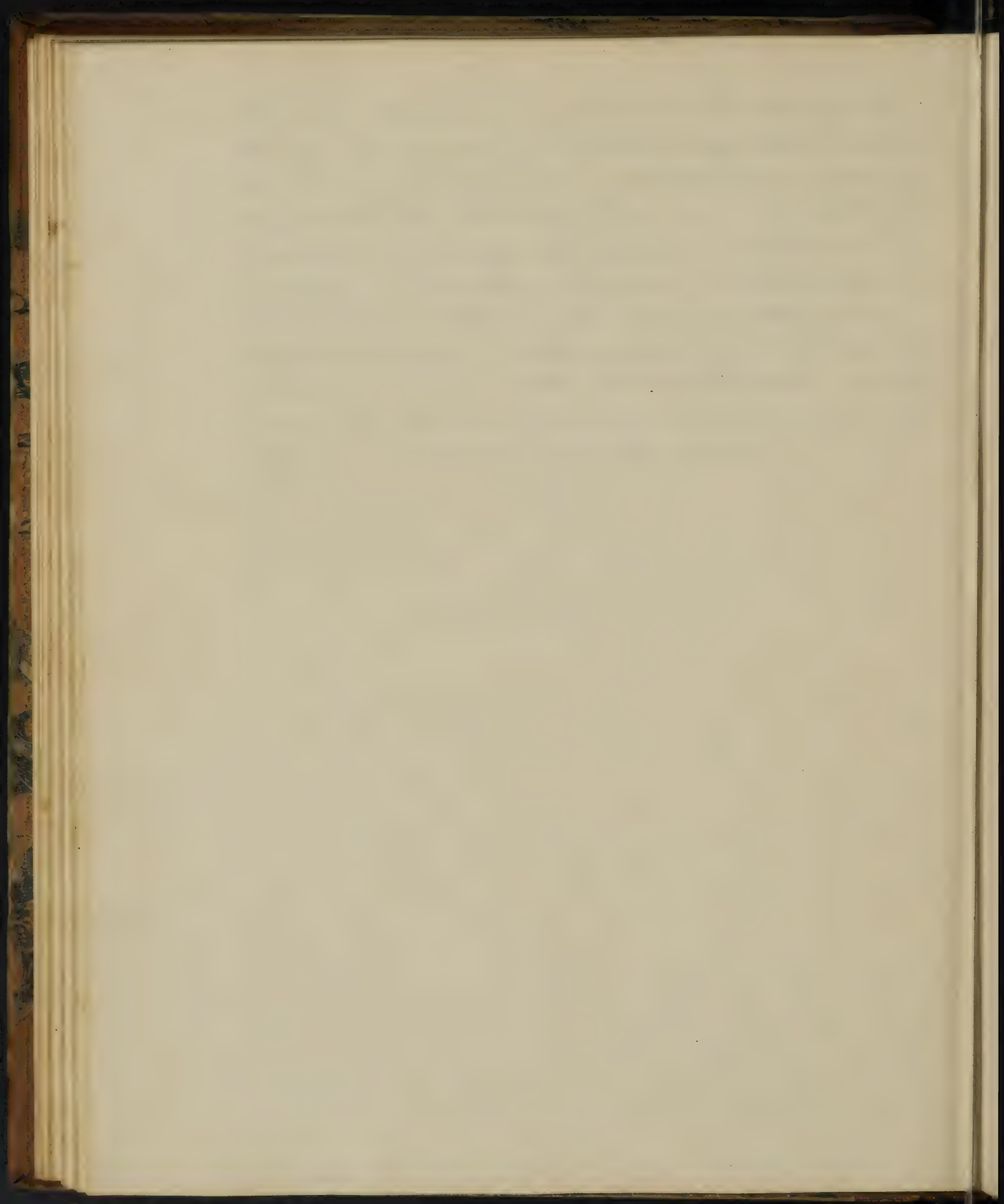
As a general rule the bailor can maintain
no other action against the bailee than detinue
or an action on the case. He may bring the
assumpsit. A recovery of detinue but that action
is now disused and has been succeeded by a
special action on the case for negligence or
breach of duty required by law. From which
is an action on the case for conversion or assumpsit
founded in the promise express or implied to keep with
care & redelivery. These are in all cases the only
action that he can bring against the bailee. (Bar
237.8. Bull. at P. 72. Cas. T. 244. Cr. Dig. 781

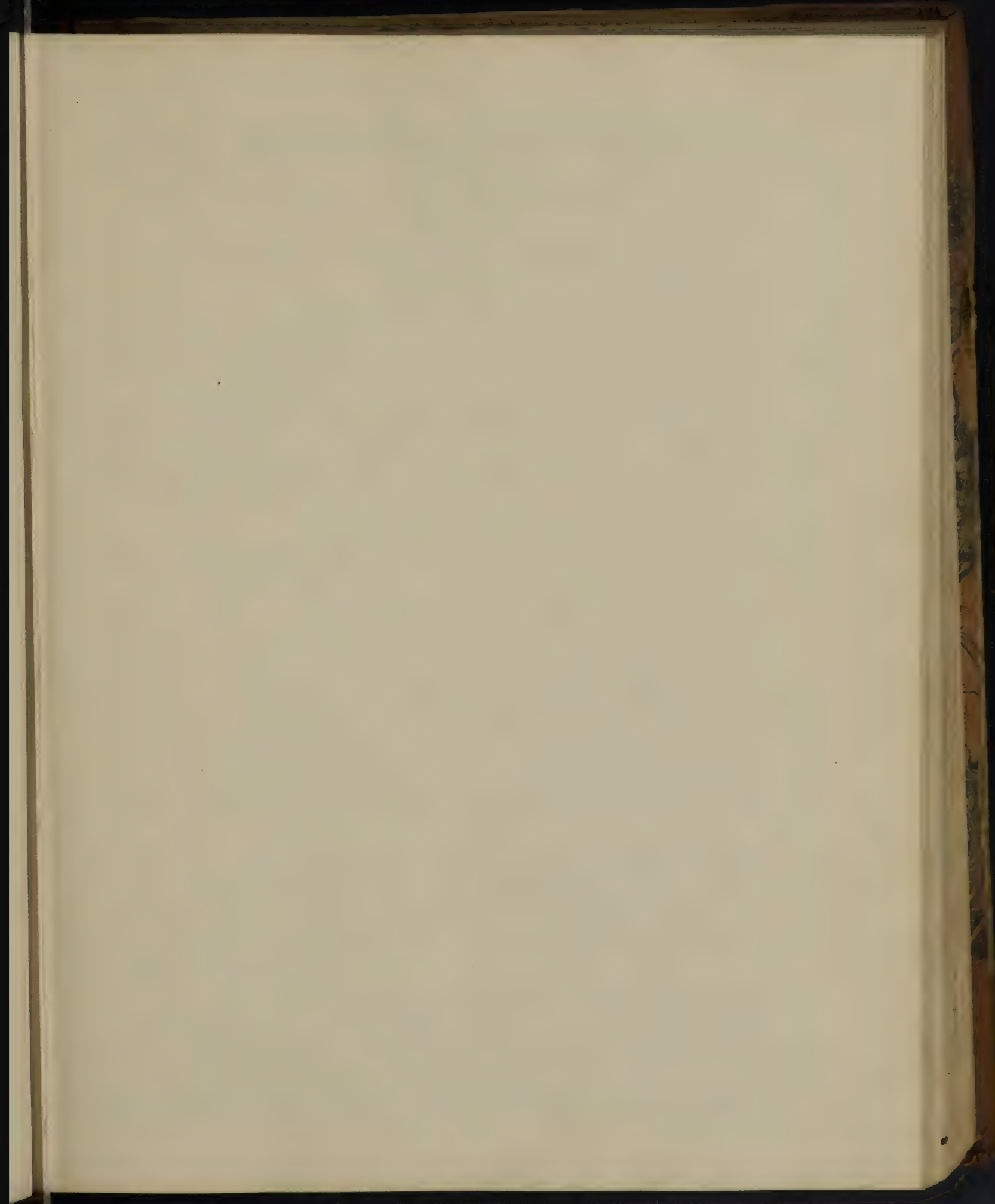
And when
the goods are lost or injured by the neglect of the bailee
the bailor may sue the bailee either in tort for the
neglect or in assumpsit on the agreement express or implied,
but not in trover, for mere negligence can never con-
stitute conversion which consists either in misfea-
sance or a positive tort & not in nonfeasance
namely. 3 East. 62 1 Wils. 282. 2 Str. 219.

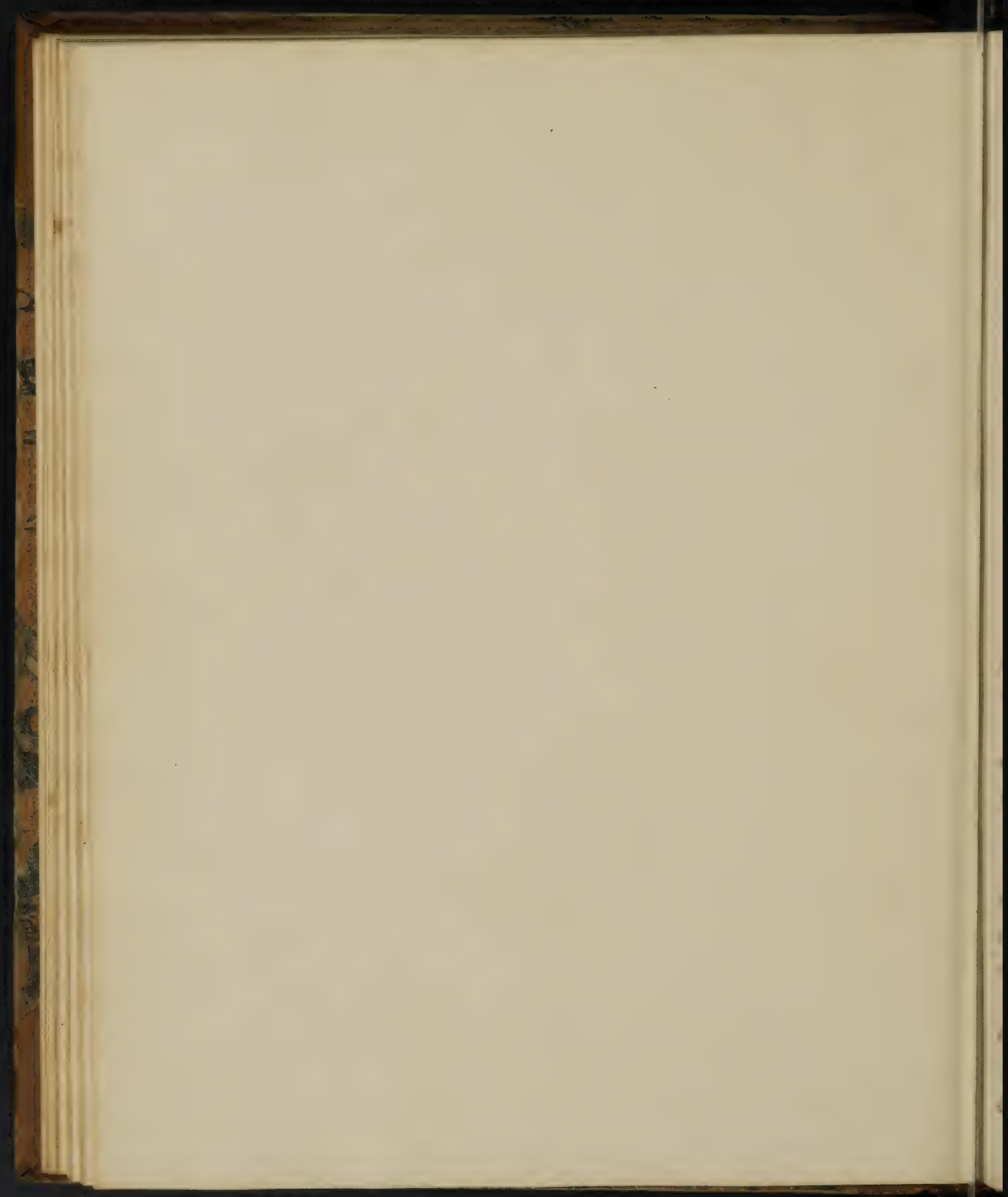
But in general
breach of promise by bailor agt bailee at the time does
because the original taking was lawful, so that the bailor
has within the actual non construction of the promise. But
there is an exception to this rule in case the bailee should
voluntarily destroy the goods he would be liable to the bailor

bailor in trespass, for by that act he extinguishes
the bailment, or as La Cote says he is presumed
to have received the goods for the purpose of destroy-
ing & not of keeping them, as an agisting
farmer who killed the sheep bailed to him to
pasture. (and I once heard a case cited to this effect
that if bailor sold the goods, bailor could maintain
trespass but I never could find it). 8 Co. 146. Park. S. 191
5 Co. 134. 1 Inst. 57. 2 Roll. 555. 2 T. Rep. 465. contra
5 Bac. 266 where it is said that bailor cannot maintain tres-
pass even in this case, not law, however.









Inns and Innkeepers.

This title is closely connected with that of badmouthing which precedes and in the course of which most of the principles relating to inns & innkeepers are noticed.

At C. Law.

any person may exercise the employment of innkeeper unless the number of inns becomes so great as to be inconvenient to the public. for by the C. L. inns are established without license. tho' the stat law of U.S. of Con I believe of most of the states a license is necessary. 3 Bac. 178. 9. 1 Roll. 84. Cro. J^r. 594. Palm. 374.

As it follows

of course that he who assumes the character of innkeeper becomes liable to its duties. &c. &c.

But inns or taverns

from their inconvenient numbers, may become common nuisances and the keepers may be indicted at C. L. as nuisances. You will readily see that this cannot be the case where the taverns are licensed according to statute, 11 B.C. 168. Cro. Ch^r. 549 & Stat. B.C. 174

So also a disorderly tavern may be considered as a public nuisance & the keeper indicted for it as such independent of any reference to numbers. &c. &c. 1 Hawk. 198. 225.

In Conn. no inn can lawfully be established unless licensed according to the statute. The rule is the same in most of the states I believe. as to the mode of appointment to an inn see 4 Conn. 625

And under our statute the fine of an inn with-
out license is punishable by a fine which is double
10 or increased in geometrical progression for
every repeated offence. H. Con. 646.

And this is now a
temporary law of the U.S. requiring all inn keepers
to obtain a license. It is not a law regulating the
establishment of inns. that is left to the individual
states. but being, & increasing the employment
of innkeepers. they must obtain a license. It is
indeed one of the sources of revenue by indirect
taxation.

Our local statute laws provide that the civil
authority & district men may suspend or otherwise
punish innkeepers. So not necessary to be explained
see H. Con. 643.

Such proceedings however do not
trust exist the C.L. proceeds by indictment for keeping
disorderly houses for there is no such express provision
in our statute. Such a C.L. right of this kind is not
in genl. to be ousted by implication.

The duties of an inn-
keeper extend in genl. only to the entertainment of trav-
ellers & keeping their goods & the animals they travel
with. 3 B. & 180. 9 Co. 87.

And if an innkeeper refuse
his without sufft. cause to keep a traveller or reason-
able hired travellers (for he is not compellable to trust
his guest) he is not only liable to an action on
the case in 1 half of the person injured. but he

is also to an indictment "it being disorderly behav-
"ior thus to frustrate the end of this institution".
L. 36. 168. 1 Hawk 225. 3 Bac. 181.

The innkeeper is required
of an innkeeper does not extend to the person of his
guest but to his property only, that is he is not ~~bound~~
to protect him from the violence of others as inn-
keepers every individual is bound to prevent breach
of the peace. But if a guest is beaten at an
inn the innkeeper as such is not liable, 8 Co.
32. 3 Bac 181

If an innkeeper by himself or servant
deals out to his guests unwholesome food or liquor
he is liable to an action on the case. 1 Roll 95. 3 Bac. 182.

The principal rules in relation to an innkeeper's
liability for the goods of his guest, have been
presented in the title of bailment. for as respects
the goods he is strictly a bailee. There are how-
ever some additional rules which I am now to
notice.

His liability in this respect is not discharged
by absence sickness or even insanity. This strictness
is founded in policy to guard guests from fraud. his ab-
sence might be on purpose to ^{defraud or to} avoid liability for intended
mischief. his sickness or insanity might be affected and
at any rate he is bound to provide against such emer-
gencies. Under the opportunities he has to defend and
fulfill make strictness in these rules indispensable. Cro.
Oly. 622. 3 Bac. 182.

An infant innkeeper is not chargeable like other innkeepers, i.e. as bailor, for he cannot make the contract express or implied on which all bailments are founded. He might however be subjected for fraud or violence or any positive torts, but not for misfeasance or mere negligence, for the law will not allow his privilege to be infringed on the ground of public policy. 1 Roll. 2. 1 Bac. 182.

If an innkeeper has not the convenience to accommodate, as that his house is full, and the traveller persists in staying, & taking his chance as the saying is, the innkeeper may be liable like other persons for positive torts or misfeasance. But in such case he is not liable as innkeeper, and if the goods are lost or injured, as in the case of a common carrier under such circumstances, the owner must bear the loss occasioned by his own folly. Dyer. 158. 3 Bac. 183.

It has been made a question whether, if a host requires a guest to lock his chamber and his goods are lost because he did not, the host is liable for them, the shaming appears to be divided. 3 Bac. 183. Dyer. 266. Moor 78. 158.

For myself I should think that he ought not to be liable, the request is certainly very reasonable & should be obeyed. There may be many in the tavern unknown to host, and if he does not lock the door the host ought not to be liable unless it be proved that he was privy.

Mostly deliv'g

a key to the guest does not however discharge the host. it is merely giving the guest an opportunity to secure his goods. it being supposed that there is no intimation of danger or request to lock the door. But it is too much to say that an innkeeper ought to keep a guard over every apartment when he has requested the guests to lock their doors. 8 Co. 33.3 Bac. 183.

And an innkeeper is liable as such although ignorant of what his guests effects may consist. tho if he was deceived as to their value by misrepresentation. I should suppose his case would be like that of the carrier which I have before considered. id. anc. 5 T. Rep. 273. Mon. 158.

As a guest and innkeeper are liable as such only to travellers and such as stay at his house in the character of guests, and at the price usually charged to travellers. He is not liable to his neighbours, even tho they should lodge in the house, as in case he lost his hat or his cane. Nor to boarders properly so called who live with him at the price charged at private houses, for there is no reason why a boarder should have a higher claim ag^t him, than against any other man in whose family he may board. the host in this case is not in the character of innkeeper & cannot be liable as such. 8 Co. 32. b. 1 Roll. 3. Skinner. 276. 3 Bac. 183.

Besides the policy of the law does not extend to him for one who lives in the house himself as a boarder can judge for himself of the character of the inn

keeper.

An innkeeper is not chargeable in the absence of the owner for any goods for the keeping of which he receives no profit. By the owner's absence he is arrant such an one as diverts him of the character of a guest, for the innkeeper is liable as such only in consequence of the relation of innkeeper & guest, 1 Roll. 3. 338. Cro. J. 188. Salk 388. 5 T. Rep. 273. Story. 126. Pop. 179. 3 B. & C. 663.

But for goods for the keeping of which he receives a profit he is liable, although the owner has left the inn & is not a guest as to himself personally, for as to the goods the relation does continue, as if a traveller should leave a horse which it is not itable for the host to keep, on the purpose of changing his manner of travelling perhaps. Cro. J. 188. Salk 388. 1 Roll. 3. Story. 126. Mow 877.

And where the goods of a man are in the possession of his servant & taken by him to an inn, the innkeeper is chargeable to the master precisely as if the owner or master himself were the guest. Cro. J. 224. Yelv. 162. Symb. 158. 5 T. Rep. 273.

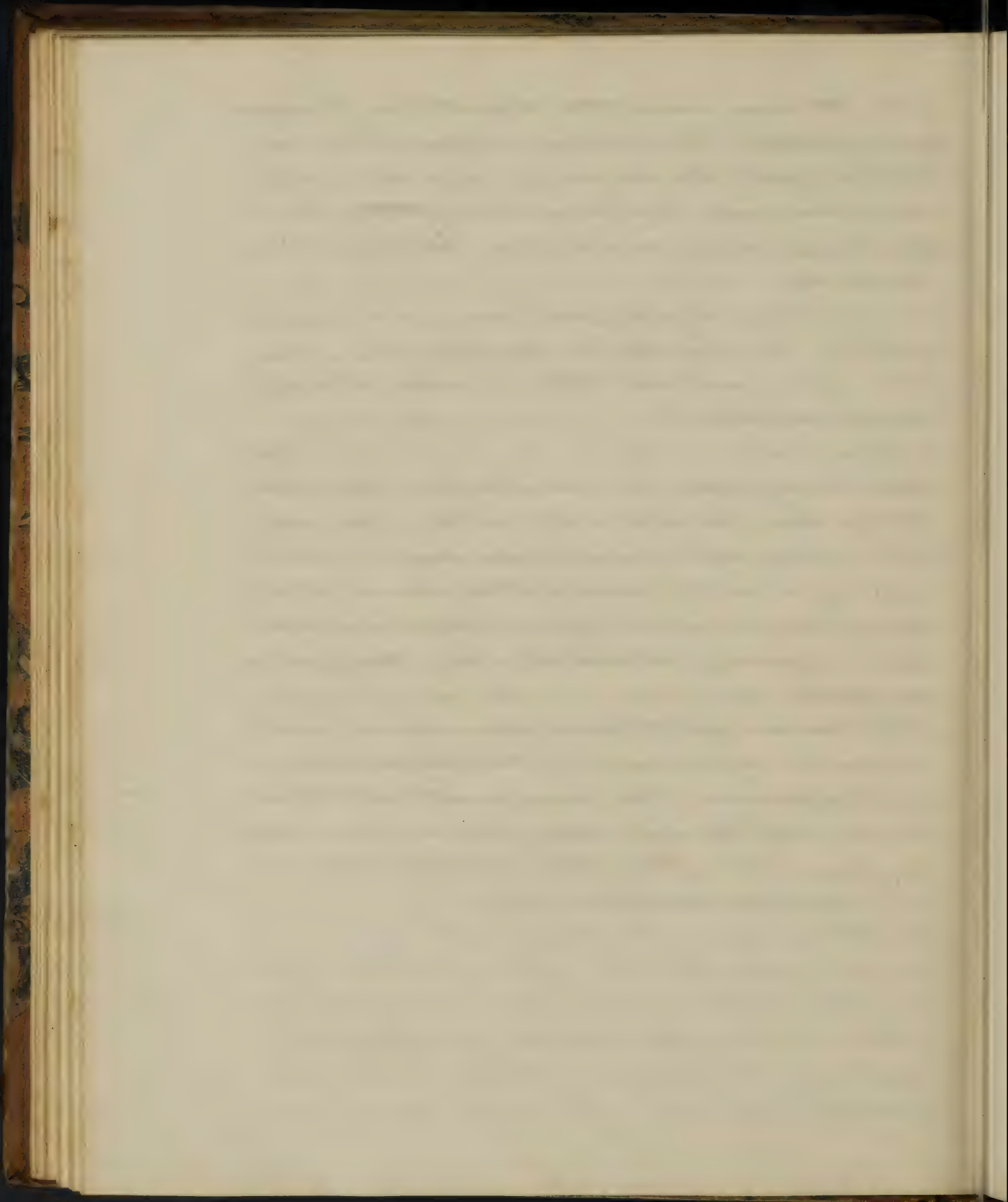
As to the remedies an innkeeper has against his guest I have already stated the rules partly to you. — An innkeeper may detain the person of his guest until the whole bill is paid, and if the guest leaves the inn without paying his bill without permission, the innkeeper may pursue & detain him and as I have no doubt

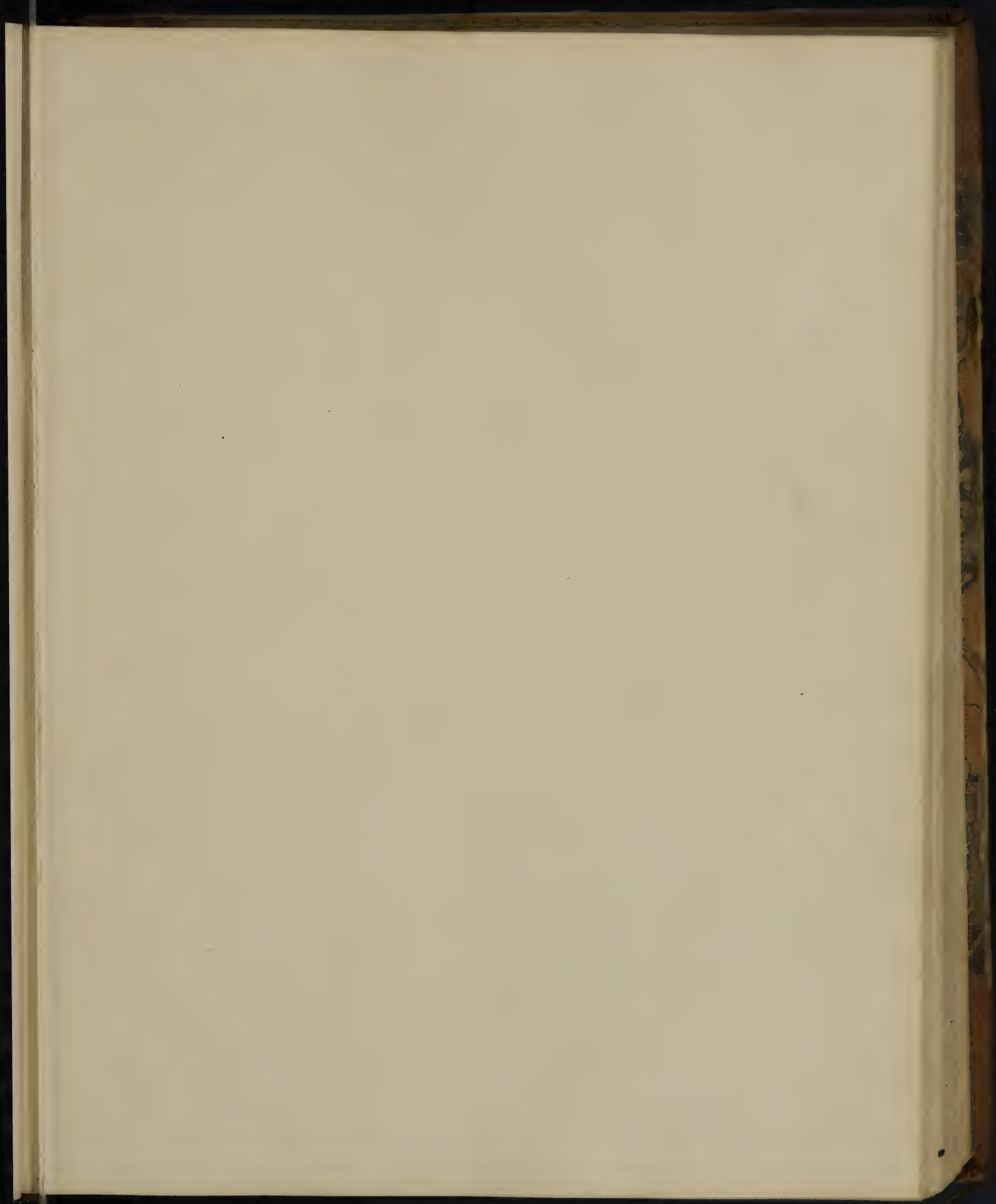
he has the same remedy altho the guest flies into a neighboring state. For it has been determined in Conn & in N York that bail may retake the principal with a bail baer in a neighboring state. As to the C H under sec 2 Roll. 85. 3 Bac. 665. 6. Galh 388 Contt. 150.

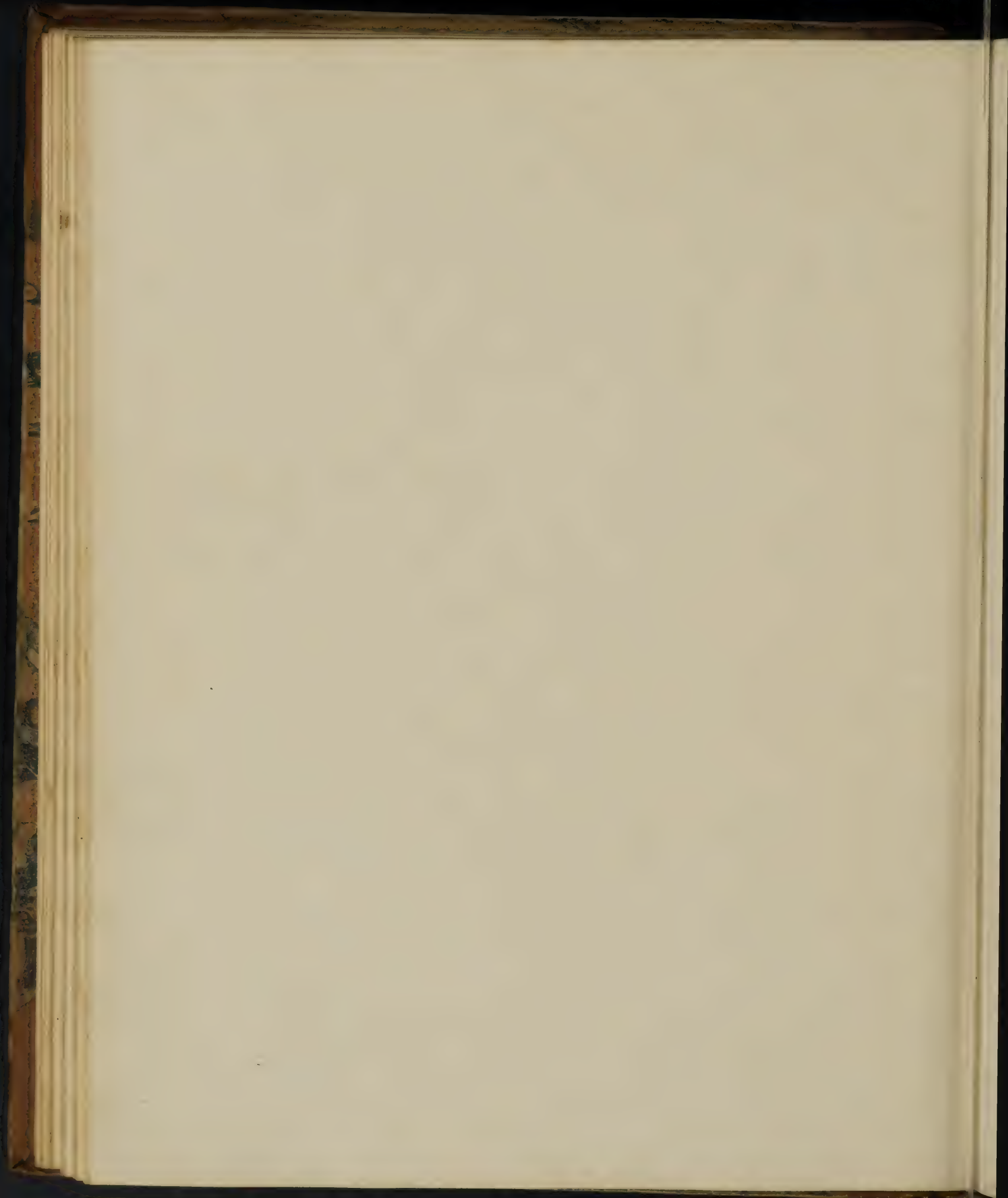
He may detain the horse for the expense incurred in keeping the horse but not for any other part of the guests bill. this is according to the guest rule in relation to him on personal chattels. it case.

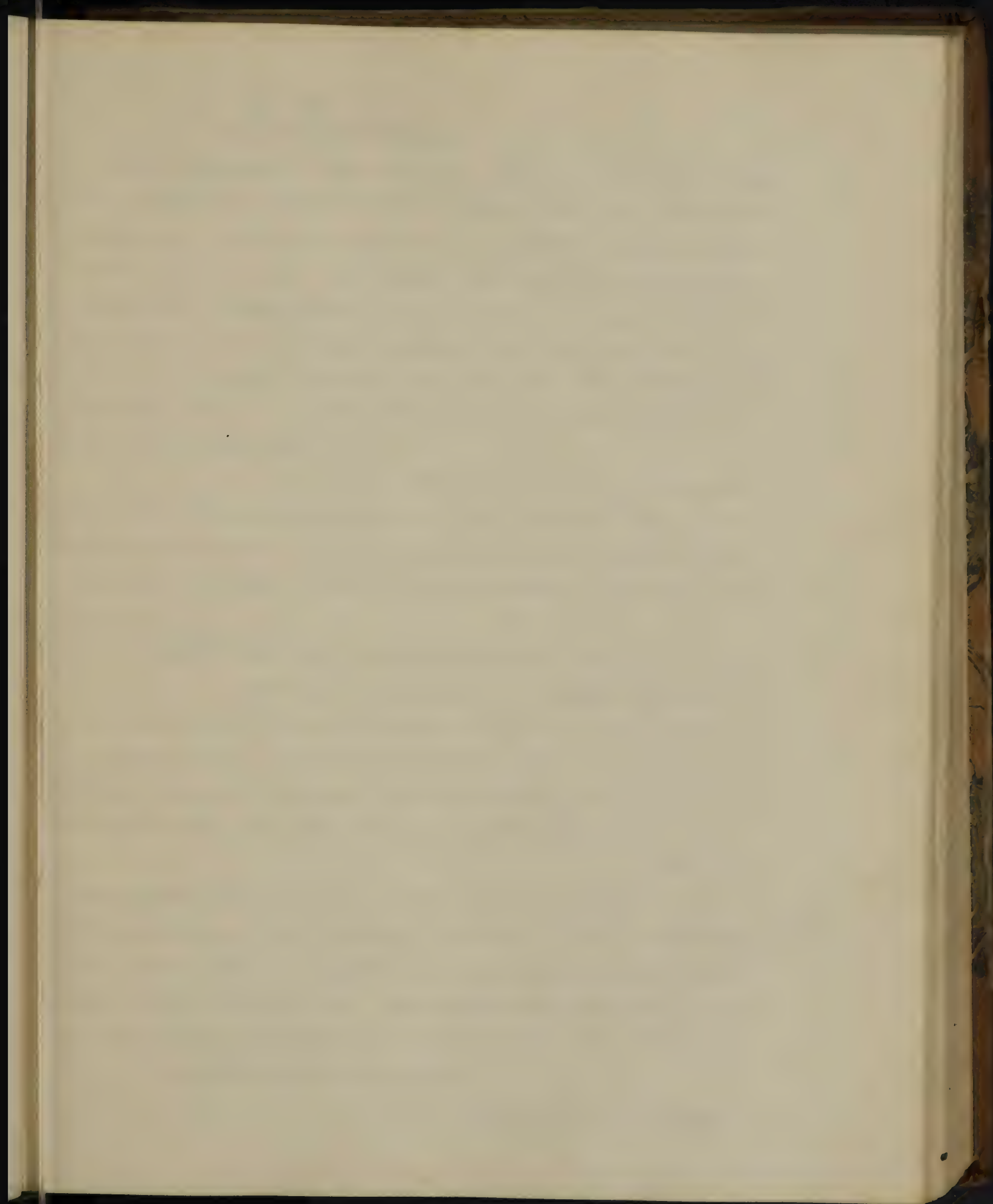
But altho he may detain the horse of his guest. yet he cannot use him. for he is in the custody of the law. is like an etrey. subject for suit, damage brought he and if he uses the horse or other animal at all the very act will make him a trespasser ab initio and he is liable to an action at the suit of the guest for the detention is a wrong in invitato & compulsory, for which the law gives the intruder a license. and when the law gives license if the party abuses it he is a trespasser ab initio & may be sued in the same manner as if the origl. taking had been unlawfully force. 3 Bac. 665. Pha. 556. More. 877.

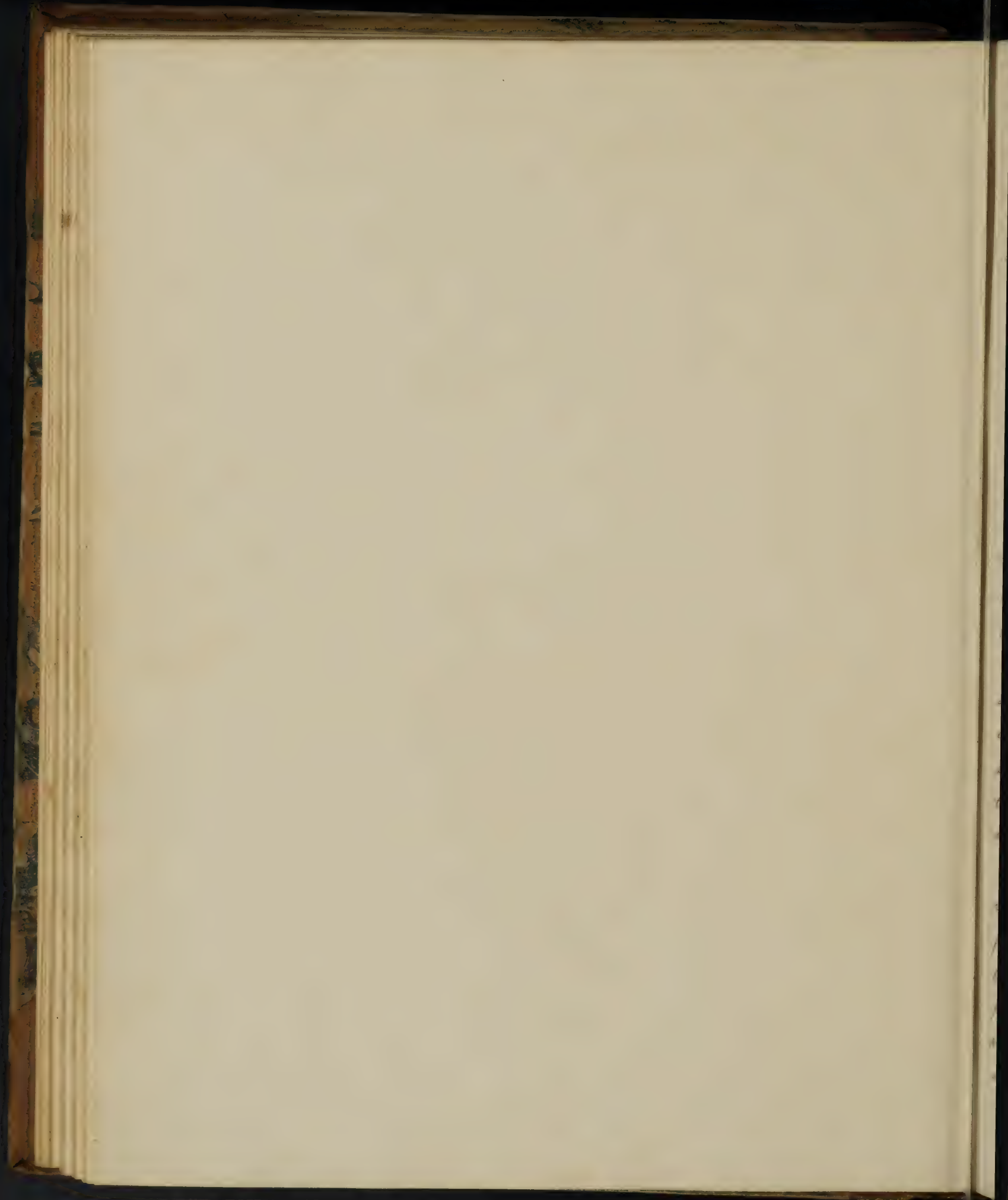
He cannot sell the horse. it case











Actions

Covenant broken. In common language the words, covenant, contract & agreement are used as synonymous, but covenant as understood in law is a contract under seal. A parole covt. is in legal language a solecism ~~the~~ phrase is however not infrequently used. A covenant is a contract written & under seal & it may be either by deed in deed or deed poll. Fitz. Nat. Bro. 340 Co. 3^d. Dig. 266. Mr. Powell speaks of covt. & ag^y as synonymous. 1 Pow. 244.5

c. An action founded on a covenant is denominated an action of covenant broken, it is broken on the deed & claims a recovery for breach of the covenant contained in it & hence it is called an act. of covt. broken.

When the covt. is in the form of a deed by indenture as well as in that of a deed poll, it is suff^t that the covenantor sealed it altho the covenantee did not. and it will support an action as well, for it is suff^t in all cases that the instrument be sealed or executed by him whom it imports to bind. Cro Eliz. 212. Co. 3^d. Dig. 266.

The usual remedy to enforce a covenant is by an action at law for damages, or covt. broken of which I am now treating. The debt will lie in certain cases, as when the covt. is to pay a sum certain, or a sum which the doubtful may be made certain by reference to some common standard or measure of value or quantity.

Thus a covenant to give

332, per bush. for all the wheat he shall have delivered
by the 1st Jan^y. debt will lie as well as covenant broken for
the proportion is given and it is only necessary to ascertain
the quantity delivered. so too if a covenant were to pay so
much as an article is worth in market. id. extenu
est quod extenua non debet probari.

But if covenants to deliver
so many loads of wood or wheat, &c. debt will not lie
here is no reference to a common standard and debt
will not lie to recover damages so nomine. *Cost.*
broken however will always lie. *34. 1089. Bull. N. P. 167*
3 Lw. 429.

But when the covenant is to do some specific act or
something in specie, distinct from the payment of
money, the most usual & effectual remedy is by bill
in Ch^y. for a specific performance, as when one cove^t
to convey land &c. see "Powers of Ch^y." 1 Fomb. 27. 139.
156. 1 Bac. 526.

But as a general rule when the compensa-
tion for a breach of covenant lies in damages only,
or in other words, when damages will be an adequate
compensation a bill in Eq^y. will not lie to enforce
the covenant.

For in the first place when this is the case
relief may be had at law as well as in Eq^y. and
it is a rule both in Eng^y & this country that when
an adequate remedy can be obtained at law a bill
in Ch^y. will not lie.

And again, as a general rule a
court of Eq^y. cannot ascertain damages, both these

reasons concur to confine such a case to the jurisdiction
of a court of law. 1 P. W. 570. 2 Bro Cha 341. 1 Dent
27. 139.

This rule however is not universal for when
the damages are the original & at the time they are the only remedy,
yet if the remedy sought is merely consequential or col-
lateral to a ground of relief proper, cognisable in a court
of Eq^l. the court may be then enforced.

Thus when in the
language of this rule, matter of fraud is mixed with
the damages, i.e. when a question of fraud is intermixed
with the damages, the court may be enforced in Eq^l.
the nothing can be then recovered but damages in
such a case. As in B in court broken at law.

B files a bill in Ch^l alleging that the covenant was
obtained by fraud & prays an injunction. & may
then file a cross bill denying the fraud & praying
relief. Then if the fraud is not proved, Ch^l will en-
force the court against B for it has been concluded by
B to stay his proceedings in a court of law by a bill of
injunction and it is but reasonable & equitable that the
business should not be complicated & Def^t should not be
permitted thus to turn the Bill round before he can
be relieved. Even in this case however neither the
Ch^l nor his officers can ascertain the damages but
are if in at law is directed, quantum damnum.
& the Ch^l assesses damages according to the verdict
1 Eq. Cas 17. 1 Bac. 69. 526. 2 Pow. Com. 216

Of the different kinds of covt. and how created.

It is to be observed that under this head there are several coordinate divisions and 1st All covenants are divisible into two kinds. covenants in deed and covenants in law.

A covenant in deed is one expressly mentioned & recited in the deed or instrument itself, between the parties. It would be more proper I think to call this an express covenant, 4 Co. 80. Esp. Dig. 266.

A covenant in law is one that is raised or implied by law. and for this reason it is called a covt. in law. This may be properly called as it often is an implied covenant or covenanted distinguished from express covenants. Thus A leases to B for a term of years & from the very fact of a lease being made the law implies a covenant on the part of A that B shall quietly enjoy during the term. it being supposed that there is nothing expressed in the lease limiting A's responsibility. 1 Inst. 384. Esp. Dig. 266.

The specific difference between a covt. in deed & covt. in law is this a covt. in deed is founded upon the words used in the instrument as amounting to an express covenant, tho the words used may not be the most correct apt or explicit.

Thus "I demise &c to A & his heirs and assigns" or "paying", "giving", or "reserving rent" these words or any of of them amount to an ^{implied} covenant on the part of A to pay rent. These words are not the most apt to express such a covt. still the covenant plainly rises out of the language of the parties.

But on the other hand a cov^t in law or implied cov^t is not all raised from the language or phraseology of the instrument, but from the nature of the contract or agreement which is implied. As in the case just mentioned c & h use the words "give grant demise & farm to" these words import a covenant in law that the lessee has a good title, and that lessee shall quietly enjoy during the term. And any one of these words of grant have the same effect.

And yet it is very obvious that nothing can be more remote or foreign from the language of the deed. I repeat that an implied covenant is not raised from the terms or phraseology of the agreement, but from the nature of the contract or cov^t. & if the lessee proves not to have title whether the lessee is evicted or not, the lessee is liable on this covenant of seisin. 4 Co. 80. b. 5 ib. 17. Ca. 11. 98. 1 Roll 519. 2 ellod. 92. Palm. 388.

All covenants again are susceptible of another division as being either personal or real. a cov^t real is one by which one binds himself to pass or assure things real as lands tenements or hereditaments. Thus if c & h make a conveyance to B in fee & covenants that he is well seized, or to warrant & defend. these are covenants real.

c & h personal cov^t on the other hand is one which is annexed to the person or which concerns personal property merely. Thus if one covenants to do an act of service for another here the cov^t is annexed to the person or if one covenants to

pay a sum of money. but it can cover the personalty. & the covenant is in both cases personal. 1 Inst. 139. Esp. Sig. 266. 294. 5 Co. 16. 17. Fity. 145. 343.

This division of cove^{ts} into real & personal is derived from precision from the subject of the contract. the former division into express & implied from a reference to the nature of the covenant or agreement.

With regard to the structure of covenants. I would observe that no set form of words, no technical language is necessary in any case to the formation of a covenant. any words showing a concurrence of the parties in an agree^{mt} are sufficient to create a cove^t any words in short importing an agreement. 1 Burr. 290. 1 Roll. 518. 1 Gro. 47. 1 Vent. 10. 1 Bac. 527.

Thus in the case I mentioned it came to A. in doing yielding or receiving such a rent, but the words are the language of the lessee. yet they amount to an implied cove^t to pay the rent. & the lessee by accepting the lease makes them his own. Here are no strict words of cove^t as that B. cove^t from contracts agrees to pay rent. yet as the intention of the parties is manifest. B. will be liable on cove^t broken if he does not pay. Cro. Eliz. 202. 1 Pow. Com. 241. 2. 1 Fort. 375.

I am aware that Mr. Powl calls the covenant in the example just mentioned a construction cove^t. but I trust that I have fully shewn in my title of

contracts, that there is no difference between what Mr. Powell terms "construction" & express contracts or covenants.

Mr. Williams the editor of Saunders Rep. calls this an implied covenant, but this is demonstrably inconsistent for the covt. to pay rent is clearly not raised from the nature of the contract. Thus if the lease were in these words merely "demise, lease" &c the lessee would not be bound to pay rent. The whole obligation arises out of the words "underlying receiving &c" which show plainly the intention of the parties, and is as plain as can be supposed. 1 Saunders. 241.6.

The subject of a covenant may be something past, present or future. Thus one may covenant with another that he has done a certain act. e.g. a covenant with his neighbor that he has destroyed a certain inclosure he formerly held against him. and if he has not he is guilty of a breach so instantly that he makes the covenant.

A covenant of seisin is de presenti. Thus a grantor or lessor covenants thus "I am well seised, I have a good title, it respects something present.

And

a covenant may respect something future as every executory contract does. as a covenant of warranty & almost all present covenants as to perform service pay money &c. Plow. 308

Covenants in law may be restrained or excluded by express covenants. i.e. when from the nature & general

structure of the contract. a cov^t in law would be raised, an express ag^t or covenant will prevent the implication. according to the maxim *expressum facit cessare tacitum*. Thus if a lease were by the words "grant & demise" the law would imply a cov^t of good title in lessor & a quiet enjoy^t for lessee. but if this were followed by an express cov^t ag^t eviction by lessor or any claiming under him, the cov^t which would otherwise be implied by law is excluded by the express one, and the covenant will not be liable unless the lessee is ousted by the lessor or some one claiming under him. See the express cov^t oust^r the cov^t in Law. *Yb. 175. Esp. Dig. 273. L. Co. 80. b. Cro. Eliz. 675*

It has been said that on an implied cov^t raised from these words, "give grant & demise" &c. no action will lie for eviction by a stranger, or by any person but the lessor himself, but this is clearly not law as it is repugnant. for the lessor is liable on such cov^t if lessee is ousted by higher title. All that is meant, probably is that he will not be liable for the acts of wrong doers, for he cannot be considered as an insurer ag^t the unlawful acts of all mankind. & in this sense it is undoubtedly true. *Cro. Eliz. 214. Esp. Dig. 268, not Law L. Co. 80. b.*

I have observed that no particular form of words are necessary for the creation of a cov^t. I have further to add that a clause in a deed in the form of a recital of a prior ag^t creates

in itself a cove^t in which an action may be supported.
Thus "Whereas it has been ag^d that it should pay 13.
£100 I. B. agree to serve it one year, the deed thus
confirms the parol ag^t. & makes it a covenant
on the part of it. 3 Wils. 465. 1 Leon. 122. Esp. D. 268.

But as to covenants in deed, if the word covenant
is not used, there must be some words used that do
import an agreement otherwise no cove^t can be made,
there must be some words which can be construed into
words of compact. Thus if the language were "lessee
cove^t to repair provided lessor furnishes timber", it does
not amount to a cove^t on part of lessee to furnish tim-
ber, so if it were "on condⁿ lessee to" there are no words
of compact. & it amounts to no more than a condition
upon the lessor's cove^t.

But on the other hand, if the ag^t.
were that lessee shall repair provided & it is agreed
that the lessor shall furnish the timber", it is a cove^t that
binds the lessor, for the superadded words "it is agreed"
transforms the condⁿ into a cove^t. 1 Roll. 518. 1 Sid.
48.

And when a clause in a deed is in the nature of a
mere defragance, it can never amount to a cove^t at
law. Thus "it cove^t to repair, but if the lessor does not fur-
nish timber this cove^t is to be void" here the lessor
evidently is not bound to furnish the timber,

If a lessor inserts a collateral bond conditioned
for the performance of the cove^t in a lease or deed

of other kinds, the obligation extends as well to im-
pound as to the express cov^{ts}. Thus a lease is made
in these words "give grant demise &c". here I observe
the cov^{ts} are two fold. that lessee has good title, and
that lessee shall quietly enjoy. At the same time
lessee executes a bond conditioned for the performance
of the covenants in the lease. Now if lessee has not
good title, he is liable on the bond precisely as he would
have been had he expressly covenanted that he had
title. and if lessee is evicted the lessee is as much
liable on the bond as if he had expressly covenanted
that the lessee should enjoy quietly. 4. Co. 80. b.

Construction of cov^{ts} on this subject the rule is
that cov^{ts} are to be interpreted liberally. By this is meant
namely that the meaning & intention of the parties is to
be sought without such strict adherence to positive dan-
dified rules as in the case of deeds or grants executed con-
veying present interest. 1 Inst. 45. b. Plow. 140. 1 Roll. 419.

Since in many instances a literal performance will
not avail the covenantor, there must be a perform-
ance ^{substantially} according to the spirit of the instrument or
the intention of the parties which is the same thing.
Thus when a covenantor is obliged to deliver to B within a cer-
tain time a bond which he had agreed to give, and
before the time sent before the bond & then delivered
it as he had agreed. the cov^t was held to be broken,
altho it was literally performed. for it was a plain
violation of the intention of the parties. for the ob-

vious intent was that the bond should be delivered up
to be cancelled, that the obligation should be extinguished.
3rd. Elij. 7. 1 Sid. 48. Esp. Dig. 270 1 Bac. 539.

So where a lease covenants to leave all the timber upon the
land at the end of the term, cut the timber down & left
it, it was held to be a breach. Ph. Ray, 464. 1 Hyl 246
Esp. Dig. 271

So if one covenants to deliver a piece of cloth
by such a time, & in the mean time so impairs it as by
cutting it into fragments that it is unfit for use, it
is a breach. So too where one c. to deliver all the
graves thrown out of his brewery and before delivery
mixed as his with others so that they were useless, &c.
anc. Skin. 39. 40. 1 Bac. 429. 242.

But on the other
hand a substantial performance is sufficient altho
it is not literal. Thus A & B. covenanted that A's
son should marry B's daughter, the son being under
the age consent married agreeable to the covt. but on
coming of age he dissented to the marriage, the per-
formance was held good. for a marriage when age
was obvious by its nature, & it was impossible that such
a marriage should not be voidable, the covt. was then
for consented as performed agreeable to the intent of the
parties. 1 Leon. 52. Esp. Dig. 270

When in the con-
struction of covt. words are uncertain so that the in-
tention of the parties cannot be precisely ascertained
they are in general to be taken most strongly against

the covenant be ever most favourably for the covenanter. This you will remember is the rule in the construction of all contracts & it is not at all confined to covenants. Thus in a marriage settlement agreed covenants to pay the intended husband £20 per annum & no time being fixed as to when the pay^t. should cease it was construed to be for the life of the husband. And it is a good rule that if one covenants to pay an annuity without limiting its continuance, it shall be payable during the life of the grantor, that being considered the most advantageous for him. (This rule evidently does not apply to cases where the grant is to one & his heirs or in fee) 1 Lev. 102. 1 Sid 151. Esp. Dig. 271. 1 Bac. 539.

If one covenants to convey land to another by such a day & before the day arrives conveys it to another the covenant is ipso facto broken and the covenantor is liable immediately altho the time stipulated for performance has not arrived. For it is a good rule that if a party once disables himself to perform, he is to be considered as having broken the covenant altho perhaps he may be afterwards able to perform it. 5 Co. 21. a. y Co. 15. More. 313. 323. 1 Johns. 522. 6 ib. 110.

So if one covenants to convey his house to B & three years hence, and then should voluntarily destroy it tomorrow. So if the covenantor to deliver one horse or any other chattel & the party should thus disable himself to perform

he is liable immediately from the very moment, &c. and c.

There are some cases in which a clause in the form of an exception in a lease amounts to a covenant on the part of the lessee & others in which it does not. The distinction is this viz.

(Rule) When the lease is of a given subject with the exception of a certain part the exception is not a covenant on the part of the lessee that he will not occupy the part excepted or disturb the lessor in the occupation of it. He is a mere stranger to it, and if he does occupy or disturb the lessor in his occupation he is liable as a trespasser, but not on the covenant.

Thus when A leases a messuage to B. excepting a certain enclosure the exception does not amount to a covenant on the part of B that he will not occupy &c. But it does amount to a covenant by him that the enclosure shall not pass by the lease, and it operates as an estoppel to him to deny claim to it.

But on the other hand, when the exception is of some thing or profit to issue out of or be derived from the thing demised, it does amount to a covenant on the part of lessee that he will not disturb the lessor in the occupation & enjoyment of it.

Thus A makes a grant of a messuage to B excepting a right of way or of a house issuing or right of passing thro' it to his out houses.

This amounts to a covenant on the part of the lessee that the lessor shall enjoy this right of easement, for it is a right or profit issuing out of the subject of the lease, beneficial to the lessor.

This construction is consistent and even necessary for the security of the lessor, for the lessee has an interest in the right of way, being entitled to the property himself so that he cannot be liable merely as a stranger for a trespass if he disturb the lessor in the enjoyment of it, it is very correct therefore to consider the lessee as insuring it to the lessor -

But in the case above there is no necessity of this, for the lessee having no interest in the estate is liable as a trespasser if he occupy it. for thus held in Cro. Ely. 68th 600. Com. Dig. s. 2. 1 Roll 431. Carth. 232. Salk 196. 1 Pow. Com. 238. 1 Bac. 531

(I send this note notes whether the case were to an indictment or civil suit. vid. 1 Pow. Com. 238. Cro. Ely. 690 in ante)

There is said to be a difference between express & implied covenants in regard to their construction: in this respect that the former are construed more strictly than the latter. When treating of contracts I give you an example illustrating one branch of this rule. When one covenants to perform a voyage to the port of London in 30 days within a certain time, the contract implies its own nature, possible and the contracting parties intended and the covenant was prevented by inevitable accident or impossibility, yet he

was held liable on the contract for the intention of the parties manifestly appeared to be that the covenant should be considered as an insurance against tempests &c. 3 Bacon 1637. 8 T. Rep. 259. 3 East. 233. 2 et Rep. 255.

Loxley.

where there is an unqualified & absolute contract to pay a certain rent for a given time, for a building and the building, is burnt down during the term even the day by lightning yet the covenantee is bound to pay the rent. This is presumed to have been the intention of the parties & it were not the less should have qualified the engagement. Sta. 763. 1 T. Rep. 315 708. 2 A. & A. 1477. 1 Pomb. 366. Esp. Dig. 270.

Whether a court of Equity would in such circumstances relieve the covenantee has been a question considerably mooted. It has not been decided except in one instance and you will the opinion, divided, 1 Ch. Ca 83. 2 Amb. 619. In short there is an opinion in favour of the lessee. And it is often said that it is not the best authority. 1 Ch. Ca 83. On the subject discussed 1 Pomb. 366 to 371 note.

Now I am of the opinion that I

think a court of Equity cannot on principle interfere in such cases. On the first view a court of Equity cannot control the law even in hard cases, it can only administer relief from a necessity to alter the circumstances that cannot be admitted to in a court of law, but there is no such thing in this case. Equity proceeds on the ground that the rule of law was not framed for such a case. In consequence of its intervention, it is *Spargan*

But as I observed there is no fact to which a court of Law may not resort as well as a court of Eq^y. Indeed it is the very case supposed in the rule above about the construction of a construction of a contract is in Eq^y as at Law. What then was the intention of the parties? Altho it may seem hard at first to say that covenants shall be limited in all events yet I trust it will appear correct on reflection.

Suppose now that A should make an absolute conveyance of a house to B in fee. and tomorrow it should be burnt by lightning. there is no pretence that B is entitled to relief. Suppose ag^t that A had leased the house for 50 years to B. whose is the house for the 50 y^{rs}? B's house property is destroyed when it is burnt? B. When there is the difference between the two cases. The truth is A sustained his obligation of the lease in losing the reversion. Natural justice is ag^t the claim of B the robin dies in his hand as the saying is he must bear the loss. When the Eq^y is applied the rule of 'as must be' would be in favour of the lessor. If the lessor is covenanted to rebuild in case of such an accident Eq^y would doubtless oblige him to perform so when the intention of the parties is clear that the lessor should insure the lessee's house he will be bound to insure the rent after destruction. Sellenger et al. 2 C. 472.

In the case of implied covenants such accidents will excuse the covenantor. There is no pretence that a lessor would be liable in the

implied cov^t for quite enjoyment if the subject was
destroyed by inevitable accidents, and indeed as I con-
ceive he would not be liable on an express cov^t to
that amount in such a case. the example however
illustrates the rule. 3 Burr. 1639. 1 Font. 366. Long. 259.

Many examples have occurred in the title of bailment
where an implied engagement is not considered satisfied
by arg^t the covenant as an express unconditional en-
gagement would be.

It is a gen^l rule that an express
cov^t is not discharged in the language of the rule
by any collateral matter, i.e. by any collateral
accident as in the example already given where an
unconditional cov^t was made to lay a certain rent
for a certain house and the house which was the
subject of the lease was soon after burnt. the
burning of the house was a collateral accident and
it deprives the covenantor of his expected benefit
but it does not discharge the express cov^t on his
part to pay the rent.

There are sev^l exceptions to this
rule and a list. Of one sort to do an act which
at the time is lawful but which an intervening
subsequent statute makes unlawful. the cov^t
is annulled. although the stat^e is a collateral matter as
to perform a voyage which an embargo or dec^t of war
makes unlawful. Here the cov^t cannot be performed
without a breach of the law, and the law will
never oblige one to do an act for the doing of which

it would punish him. Esp. Dig. 270. Talk. 198.

And this rule is not at all inconsistent with the constitutional provision which forbids the passing of statutes impairing the validity of contracts, for that refers to such acts as are made for the very purpose of dissolving contracts. but in this case the dissolution of the contract is merely the accidental effect of a statute prescribed by public policy.

Secondly. If one contracts not to do a thing, and the statute which is afterwards enacted makes it his duty or enables him to do it the covenant is annulled. If a cov^t by A to give B. from this time one year without interruption and a subsequent statute should compel him to have B. to suppress an insurrection or repel an invasion the cov^t will not bind ^{him} ~~him~~. As the rule is just laid down the word "lawful" is inserted after "thing" but it is immaterial whether it were lawful or unlawful in cases where this rule will apply.

If however one cov^t not to do an act at the time unlawful a subsequent statute merely making the act lawful does not annul the cov^t for the act & the cov^t are not at all inconsistent & one may be performed without violating the other. 1 Talk. 198.

It is a general rule that cov^ts respecting any particular subject matter are to be confined in their operation to that which is in being at the time

of the court made. Thus if one court to pay all the taxes,
it extends only to those taxes now existing, or at the ex-
pense of the court & not to those of a new kind afterwards
imposed. As if the existing taxes were on hearths, the
covenantor must pay all these but if during the
term a new kind should be levied as on windows
he would not be bound to pay them 1 Lev. 68.
1 Vent. 223. 3 T. Rep. 377. Sta. 1191.

If a person to
whom an obligation is given assigns it by deed to
another this assignment contains an implied cov-
enant on the part of the assignor that the assignee
shall have all the benefit of the obligation,
that he is at liberty to collect it in the name
of the assignor and without interruption by him
and also that the assignee shall enjoy the avails
of it when collected.

The C L rule that a chose in action
cannot be assigned means merely that the assignor
shall not sue in his own name. Still however the
assignment remains good as between the parties & if it
were made without deed it would be a simple con-
tract of the same effect. If then A had a bond
against B. & B. should assign it to you if I collect
it I prevent you from collecting it or release it.
I am liable on my cov-^t since the gen-^l words
of grant or assign-^t amount to a cov-^t of this
kind. & the law will imply such an one
from them. 1 Pow. 317. 1 K. 125. Ebit. B. 14. 109.
2 Rep. 683. 1242. 3 K. 304. 2 Vern. 541.

In Conn. the usual remedy for the assignee in such case has been to sue the obligor in an action on the case for fraud for paying the original creditor or receiving a release from him after notice of the assignment in he is liable as well as the assignor. In Eng assignee the original debtor the only remedy is in Eq^{ty} for the assignor can no more sue him for fraud than he can on the bond. It is I presume is the course in those states where they have courts of Ch^{cy}. But in Eng or in those states referred to cannot for fraud against the assignor well not lie, the remedy against him must be by court broken or an action on his undertaking when the assignment was by parole.

A court in one deed cannot be pleaded in bar of an action on a court in another deed even if the former is in the nature of a defeasance or evadition. 2 Vent. 21. Esch. Rep. 305. Thus if the covenant is one deed give a deed binding himself not to sue covenantee for one month on the former, the latter cannot be pleaded in bar to an action on the former the the party suing may be afterwards liable in court broken on the latter deed?

But a defeasance in a separate deed may be so pleaded. Thus if after a court in one deed by A to pay a certain sum of money to B. B presents a separate court in a distinct deed conditioned that on the happening

of a certain event the former covt. to pay shall be
void. then on the occurrence of that event should
be in ab. I may plead the latter clause in bar.
Galk 573. 375. Cro. Car. 426. Cro. Jac. 300. 623. 3 Galk 298

There also to near to the exception first given a covt.
by a cond. note to sue a debtor for a limited time is no
bar to an act. but for the recovery of the debt. but
the covenantor by suing within the time makes
himself liable on the covt. The reason is that if the
covt. could be pleaded in bar of the action for the debt,
it must be in effect a release of the
debt. but if a personal right or a right of action
be once suspended it is gone forever & a release there-
fore of the debt during the time is a release of it for-
ever & this is evidently contrary to the intention of the
parties, Hob. 10. 2 Am Bl. 15 note. Carth. 63. Galk 573.
Ray a 187. 393. 413. 2 Pow. Con. 255. 1 Show. 466.
1 Hall. 939. 3 Liv. 41. 4 Bac. 265 1 B & P. 663.

But if such a covt. make a part of the instrument as
by a man or a deed indorsed or a clause in a deed written
it may be so pleaded & does prevent a right of action
to recover the debt until the time expires, tho on the
face of the instrument the debt is payable on de-
mand. For the covt. is, in this case, part of the
same deed that creates the oblig. & the whole is to
be consid^d together. And these different parcels of the
same instrument when taken in conjunction are con-
sidered as a covt. to pay the debt at the expiration of

of the time appointed. 8 T. Rep. 483. Esp. Dig. 306. 6 T.
Rep. 737. 2 A. Ray. 690. 1 Geo. 152.

But I observe again
that ~~is~~ ^{an action on} a judgment rule that an covenant may be pleaded in
bar to another cov^t in the same suit tho' there are no
words of defragance in the case: for the sense of the in-
strument or the intention of the parties is to be collected
from the whole and (as I before observed) with all its
parts. it amc. More 679.

Thus Lifer cov^t to pay \$100 per an-
num. & then follows another cov^t on part of Lifer that
Lifer may \$50 of the \$100 for repairs. Before has actu-
ally paid 800 & Lifer sues him on the former cov^t for
remaining 800. Lifer may plead the latter cov^t in bar.

This rule above stated "that a cov^t not to sue for a limi-
ted time is no bar & does not operate as a release" ^{does not}
does not apply to any other than personal actions. for
a cov^t not to assert a real right for a limited time may
be pleaded in bar. for it may be treated as a release
for such time and still not amount to an ex-
tinguishment of the right. as a temporary sus-
pension of a personal right would. 2 H. Bl. 4.

That a cov^t never to sue at all is a bar to a real or
personal action and may be pleaded as a release.
Cro. Jac. 352. 1 T. Rep. 446. 8 H. 170. 286. 1 Roll. 239.

This rule is designed to prevent a multiplicity of suits to pro-
duce in the same effect. for if the cov^t never to

see was to be treated merely as a cove^t it would not bar the action, the covenantor might sue & recover, but then the covenantor might afterwards sue the covenantor & compel him to refund, which would leave the parties in statu quo except the costs & trouble which the will have been at to no purpose. And this is one of those cases in which an instrument in one form operates as an instrument in another, it is in form a cove^t but it is construed & takes effect as a release. 1 C. R. 446.

But a cove^t not to sue at all or never to sue one of two joint & sever^{al} debtors is no bar to an action against the other debtor, & it seems not to be to an action against the covenantor himself. 2 Ray 690. Holt. 178. 8 T. R. 168. 171. 11 Mod. 254. 1 Mod. 551.

Now the reason of the rule is that it was evidently not the intention of the creditor to release the whole debt if it had been he would have released both. The cove^t amounts merely to this that he will not sue one of them a suit may be brought on such a contract with or without joining the obligors, & if the covenantor sues both he will recover of them but the covenantor may recover back his prohibition in court broken.

But if the oblig^{ee} were joint and not joint several a cove^t never to sue one of the obligors would I conceive be a release of both, for he cannot in this case sue without joining both parties, and all remedy appears to be intentionally abandoned. This

can however is not settled in the books.

Altho a covenant
not to sue within a limited time is no bar to an
action. Yet if a cred^r cov^t with his debtor not to
sue within a given time ends, that if he does the
D bond or obligation shall be void. This cov^t
may be plead in bar to an action of the D bond
or obligation. For then are proper words of dispa-
fiance and the cov^t operates as a release to extin-
guish the debt if the suit is bro^t within the lim-
ited time. Cent. 64. 210. Comb. 123. 1 S how. 46. 330.
350. Holt. 619.

A cov^t not to sue one in a foreign
country is good bar to a suit in a foreign country
yet the release is merely local & not total. Thus
the seamen of a Dutch ship covenanted not to
sue the capt. in a foreign country & this was
held a good bar to an action bro^t before the
C. P. in Eng. altho by the rules of C. L. it would
not bar an action in Holland. 2 Allen 663 1771.
1 Ray. 691. Comb. 49. 139 3 Call 298.

How much a cov^t is
this is allowed by law because it is in itself reasonable & con-
sistent with good policy. Suppose two in civil war stand
from the one to the other and Europe. Having expressed
a cov^t of this kind would be my covenant for it
must be extremely preferable to be sued in a foreign
country a distance from friends & resources.

But a cov^t by which one stipulates to exclude himself from

the benefit of resorting to the courts of justice in his own country is void. 2 Thom. 666. In such a case is opposed to good policy: it is nothing less than an act to renounce the protection of the laws, & the covenant has no more right to bind himself than he has to bind another to a similar situation.

Indeed it is a consequence of this rule that a mutual, amicable submission of a civil claim to arbitration is unlawful not however, void, for the award is binding when thus made, but it may be rescinded. This however does not go the whole extent of the rule & it ought not for such submission ought to be encouraged still however the law will not compel a person to submit to such an act. The courts of justice are the proper resort

Of those covenants which are ordinarily used in deeds of conveyance.

In all deeds of conveyance except what are called in this country "quit claims" but more usually "releases," there are regularly two covenants either express or implied viz

1. Covenant of seisin. 2. Covenant of warranty or as they are termed when speaking of houses of good title before and of great importance in that the latter shall quietly enjoy. The first is nothing more or less than a covenant of title. The second a covenant to defend that title 2 Co. 80. b.

Observed that there were then two covenants

is expressed or implied in all conveyances except
quit claims. and if they are not expressed, they
usually are the law will imply, them from the
words 'sedi concepit' &c unless there is something else
in the deed to exclude or rebut the implication.
1 Roll. 514 520. Eym. 257 2 Mod. 42 Esq. Dig. 266.
to 268.

A cov^t of seisin or good title is a cov^t de present
i.e. an affirmation by covenantor that he is well seized &
has the necessary title to make a valid conveyance, & that
if the title be not sufficient to make the conveyance
the covenant is broken immediately on the making
of it.

Therefore in a cov^t of seisin grantor may sue before
eviction by the person having good or better title
& in order to maintain the action it is suff^t for
grantor to show that grantor was not lawfully
seized: it is not necessary that grantor should
allege eviction or that he has sustained special
damages but merely that covenantor had not
the title which he professed to have. Cro. Jac. 170
369. 9 Co. 69. Esq. Dig. 299.

In an action on cov^t of sei-
sin it is suff^t to allege that the Def^t was not well
seized without stating who was. It was some years
since determined in Com to the contrary, but the
rule is now well settled that in pleading on the
cov^t "that I am well seized" it is suff^t to negative
it by averring that Def^t was not well seized. At
that becomes incumbent on Def^t to show that he was

seized and if he proves that he was seized from a
feoffor, it throws the onus on Deft to show who was
seized or a higher title in another. And if no title
at all is shown by Deft. or if Deft shows a higher
title in another the rent must prevail. ib. ante.

c & covenant of seisin is broken not only by a total defect
of title but by an existing incumbrance, as by mortgage
unless that incumbrance is accepted in the contract. Thus
a mortgagor covenants that he is well seized of the sub-
ject of the mortgage. This covt. is broken by the exist-
ing incumbrance, whereas if mortgagor had cove-
nanted that he was well seized excepting such incum-
brance he would have been safe. 3 East. 491. 4 Johns.
10.

In this case however where the breach of covt. con-
sists in a mere incumbrance, that incumbrance
must be specially alleged in the declⁿ by show-
ing the nature of the incumbrance & the ground
or cause of the interruption. It is not as in the
former case (where there was a total defect of title)
sufficient for covenantee to aver merely that covenan-
tor was not well seized for here the covenantee takes
the affirmative & must probare it and therefore
should so allege that covenantee should have had
due notice of the facts or grounds of action &
an opportunity to waive them precisely. 2 Johns.
Rep. 433. 437.

c & covt of warranty or quiet enjoyment
is on the other hand is a covt de futuro, amounting to

this that the covenant will defend the title or that the
covenant shall greatly assist. On this covenant
then the life cannot run until evicted, and it
must not only appear in the Decⁿ that the victor was un-
der title but also that it was under good & clear title.
4 Co. 80. b. 1 Mod. 292. 4 T. Rep 617. Cro Jⁿ 315. 1 H. Bl. 3. 6
277. Esp. Dig. 301

alleging in the Decⁿ that covenant
was evicted by such an one having lawful right &
title is not sufficient. for this right & title may have
existed and have been derived from the Plaintiff himself in
such case he certainly could not recover. 1 Sid. 466.
2 Saund 177.

It must appear then in the Decⁿ that the
victor had clear & better title than the covenant
conveyed to the covenantor. Since also to aver that
the victor was by gift is not sufficient and
includes much less so than the former averments.
for it does not aver any title in the victor, the mes-
sage might have been had without defence, by col-
lusion by false testimony or some mistake. Cro
Jⁿ 917. 4 Co. 80. b. 1 Pow. Cur. 379. 403. 4. 388. 9

There is however no technical force of words neces-
sary in alleging this clear title in the victor,
but if it appears in the declaration that the
covenant was made by a person claiming
under clear title it is sufficient. the words 'clear'
title are not technically indispensable. 2 Lev. 37.
4 T. Rep. 617. 8 ib. 278. Esp. Dig. 302.

Now is it necessary ^{even} to state under what title the
victim was. i.e. the covenant is not bound to deduce
the title of the victim in his dectⁿ as that he was the
heir or devisee of J.S. or that he was a prior grantee
of the same subject from the covenantor. He need not
in short show how or from whom the victim derived
his title. it is enough to state generally that he by
one claim and better title. 2 Lew. 37. 4 Ter. Rep. 614.

See however 2 Conn. 177. 1 Pick 466 When the
court is made to say, in the language of the reporter,
that the Plff must show under what title the victim
entered, which is in terms a plain contradiction of
the rule I have just laid down.

If however this
language is referred to the words in the dectⁿ it will
be obvious that it means nothing more than that
the Plff must allege elder & better title in the victim
which is precisely the rule before laid down. The
words in the dectⁿ were legale per et titulum.
the court held this not sufficient as they already were
not by the former rules for the victim might have
had title under the Plff.

This I take to be the
true construction of the language of the court in
that case altho it would apparently imply some
thing. if however it means anything more it is
not law.

The reason why it is necessary to allege title
at all is because the cov^t of warranty does not
extend to the tortious act of others. Thus if one

covenants to warrant & defend against all claims
& demands whatsoever" he does not become an in-
surer against the torts & crimes of all mankind
that a felon shall burn the house &c. it extends
only to the title, and is a covt. merely to warrant
& defend there. And it is not broken unless the
covenant is evicted by one having higher and
clear title than grantor had. In other cases of
injury, the covenant must take his remedy agt
the wrong doer. Sta. 400. 3 T. Rep. 584. 4 ib. 619.
Hob. 34. Esp. Dig. 273 331.

if grantor may indeed
repeal by covt. agt. the tortious acts of third persons
in any one by his own voluntary act may for
sufft. consideration subject himself to any
degree of responsibility even for inevitable acci-
dents. And in such cases an avowment of de-
den & better or indeed of any title at all is not
necessary. Esp. Dig. 273. 4

And it has been deter-
mined that a covt. to warrant & defend agt. the cl-
aims & demands of a particular person, extends
to tortious evictions by that person, and this rule
is founded on the supposed intention of the par-
ties. Hob. 95. Cro. 86. 212. 1 Roll. 413. Sta. 404

I submit that this rule is founded on the supposed in-
tention of the parties, and it has been received
hand down without a question. But I con-
fess that this construction of the intention appears

to me questionable, and I should doubt whether the in-
tent of the parties were affected by it. Such a
cert. appears to me rather a specification of the
prob. cert. than an extension of it. that the
warrantor cert. ag^t the claims of J. S. & that the
grantor takes the risk as to all others. And at any
rate if he is to be considered as warranting against
the claims & demands of all persons as well as
ag^t those of J. S. yet it seems to me to be strain-
ing the construction to say that in warrant ag^t
the bonds of J. S.

But if the covenantor himself disturbs
the covenant even by tortious act under a claim of title
he is liable on his cert. and Jeff. need not state that he has
any title, if the act stated in the decⁿ appears to have
been an assertion of right, which is what is meant by a
tortious act under claim of title. it is sufficient.

And this rule
holds altho the cert. by the very terms of it ^{and} expressly confines
to lawful evictions. for if the covenantor were to evict the
covenantor by an act clearly unlawful under claim
of title he is liable, as "locking up a pew" which had
been demised with such a cert. & stating the fact of lock-
ing was held suff^t assessment as it amounted to an
assertion of right. And the reason why the last
rule holds is that the covenantor cannot defend
himself by alleging that his act was unlawful, being
in fact (tho not technically) stepped by his cert.

1 T. Rep. 671. 1 Roll. Rep. 21. 2 Thom. 125. 88 J. Dig. 273
300. 302.

And the rule is the same as to all persons included in the covt i.e. the representatives of grantor both real & personal, as his ^{Heir} Ex^{or} & adm^r ~~and~~ if he dies and his heir at law were to violate the covenant, or disturb him, altho without title, yet if it were under claim of title, he is liable on the covt in the same.

Again in the case of lease an eviction by lessee himself suspends the rent, but a mere trespassing act does not, for an eviction by lessee is a breach of the covt that will prevent his claiming performance on the part of the lessor, a mere entry or trespass however does not amount to a breach. Comp. 242

And this rule again is the same when the eviction is by any person included in the covt as his, except the Dyer 257. b. 1 Roll. Rep. 21. 55 p. Dig. 302 And the rule is the same as the his except he are not named in the covt. as appears by the same authorities.

And cov^t by one Ex^{or} as such, for quiet enjoyment against all persons whatever is restrained to themselves & persons claiming under them, hence to subject them on such a covenant the breach must happen by or in consequence of some act of the Ex^{or} themselves, i.e. it must be directly or indirectly their own act.

Thus a tenant for years dies the time being a chattel goes to his Ex^{or} & before they make an under lease committing as Ex^{or} for quiet enjoyment ag^t all persons this covenant cannot be

broken receipt in consequence of some act of the buyers themselves, i.e. not by the act of any other person or persons. *Shep. Touch. 163. 1 Ann. c. 6. 34.*

It is a little difficult to be satisfied that this construction of a covt. so broad, is according to the intention of the parties. There is however a technical reason for it which I do not find in the books viz. That the Ex^r when coming into court as such acts as representative & can be made liable only in his representative capacity. & in that capacity he can be considered only as asserting the testator's rights. if he asserts to do more he acts in his private capacity, when therefore he comes as Ex^r against the claim of all persons, it must be considered as a covt. to assert nothing more than the testator's rights after all however it is not certain that that was the intention of the parties.

I have now explained to you the difference between a covenant of seisin or of good ^{title} and a covt. of warranty or of quiet enjoyment: & the different actions maintainable on them & on what ground.

The rule of damages in an action on a covt. of seisin & that in an action on a covt. of warranty are different And our rule as to the latter (i.e. in case of an action on warranty) is different from the Eng. rule.

In an action on a covt. of seisin when Plff prevails he recovers the consideration money & the interest. The interest I suppose is to be computed from the time of pay^t if the money was paid.

if it has been laid down, or from the time that it drew
interest from the covenant, 2 Mass. Rep. 433. 4 45
4 il. 108. 1 Selw. et. P. 551. note. 1 Root. 108. 2 il. 294
4 Johns. 1. 3. 6. 5 il. 49. 4 Dallas. 115. Kirk. 3.

Now you perceive
that the Plaintiff recovers, in common presumption, the price
of the land at the time the covenant was made & broken
which was instantaneous. And the rule of damages
in an action on the covenant of seisin is the same here
as it is in Eng.

In an action on the covenant of warranty
in Eng. the Plaintiff recovers all his considⁿ money with
interest and the costs of the suit in which he was wronged,
but nothing for improvements or the rise of the land
this is the 2^d rule obtaining in Eng and New York
3 Cairns. 111. 4 Johns. 1. 3.

In our however and Massachu-
setts, the Plaintiff in an action on the covenant of warranty
recovers the value of the land at the time of evic-
tion and the damages sustained by the eviction, i.e.
the costs of the suit in which the property was wronged
from him. Kirk. 3. 2 Mass. Rep. 440. 3 il. 543. 546.

I confess that I am inclined to think our rule the cor-
rect one according to principle. Now in an action on the
covenant of seisin Plaintiff recovers the value of the property at the
time the covenant was broken that is at the time it was
made, in other words the considⁿ money which is the dam-
age he suffered in consequence of the breach of that covt.
It would seem then from analogy that in an action on the

^{of payment}
court, the Diff. should also recover the value at the time of
the breach. i.e. at the time of eviction.

But in a country
like this I think ours to be the only rule that can do
justice between the parties. In Eng it is not so material
as to the time at which the value of the land is made
the rule of damages, for there the value does not fluctuate
as it does here. the same rent is now paid as was paid
centuries ago. at best, the alterations, arising from acci-
dental circumstances are very slight.

But in such a coun-
try as ours especially in the new parts of it, justice re-
quires that the grantee should be paid for his trouble &
expense & making improvements, and for the rise in the
value of the land in consequence of the settlement which
which he has contributed to make up. These damages the
Def't ought to be subjected for, as they were suffered
in consequence of his breach of cove.

On a cove. of assign
the assignee of the grantee i.e. a subsequent purchaser
cannot maintain an act. ag't the original cove-
nant. Thus it comes to B with covenant of assign. & then
B to C. now C cannot maintain an action ag't B
for, the cove. was broken at the moment it was made,
and of course the right of action accrued on it before
the assignment. but a chose in action by C. cannot
be assigned. therefore C. cannot bring the action, in
other words if C can maintain the action, it must
be by virtue of the assignment of a chose in action which
would make a chose in action negotiable, which is

plainly contrary to the rule of C.L. Bellap Rep 439
Bull. et. P. 158. 2 Esp. Dig. 295. 2 Johns. 1. Same point
has been determined in Com in the case of Tyler &
not reported.

But in the case of a cert. of warrant
to take the last example, C might maintain his
action against A (as he obviously might ag^t B if
he had conveyed with warranty) for in this case the
cert. is broken in the time of the assize, then was
no right of action until the cert. came into his
hands so that there is no assignment of a chose in
action. C is the person injured. 5 Co. 15. b. 17. a. Chitty
Pl. 3. 11. 1 Inst. 384. b. Shap. 198. Bull. et. P. 158. y. 3 Johns.
471. 5 ib. 120.

But an intermediate assignee who has not been
damified either by eviction or being subjected to a second
or subsequent assignee cannot sue the original grantor, for
if he could grantor might be subjected to an indefinite
number of actions, for if one intermediate assignee
not damaged might maintain it another might.
1 Com. Rep 244.

In all cases however the original cov-
enant might be broken on principle recover at least
nominal damages in an act. on the cov. of assignment
the original covenant. for a right of action upon it ac-
crued when it was broken which was the moment it was
made & this right has not been used can it be trans-
ferred. But not so in the case of warranty for that
has gone out of his hands & he has not broken it
his remedy. The last covenant is a mere subsequent

purchaser cannot maintain his act^g covenant or
seisin for reasons already given, but it is to be noted
that the first covenantor may allege his damages would
be nominal as he has received no actual damage. There
is however no such case.

In an action on the cove^t of seisin
the Def^t having acquired title after action brought is no
defence. Thus A having no title conveys to B with
cove^t of seisin. He then purchases title which will come
to the benefit of B. by way of estoppel. "it is ingrafted
upon the old stock"

It is however no defence for A, for
the cove^t was broken the moment it was made & the
law always presumes damage. B then has a com-
pleted right of action at the moment the cove^t was
made, and it cannot be diverted by the non act
of the covenantor. the time of commencing the
suit can make no difference if it be after cove^t
made. the damages however would be mitigated
by this subsequent acquisition of title, in as much
as the benefit of Pl^{ff} he can suffer no actual damage.
5 Johns. 49. 4 East. 507. 3 T. Rep. 186. 2 Lland. 171.

If an action of eject^{io} be brought against grantee by one
claiming under higher title, the covenantor
or grantor ought for his own security to notify
the covenantor, that the latter may appear & defend
if he please. This notification is called, when the
interest in question is a freehold, "something in the
grantor or covenantor" and when they are a leasehold

does not appear the covenantor must defend as well as
he can. 3 Bl. 300. This vouching in you observe must
be vouching a party to the record which enables him
to defend if he chooses 2 Roll 396. Gilb Et 28.

I observed that the covenantor is not for his own secu-
rity to vouch in the grantor, he is however under
no obligation to do so and he is as capable of
defending the title as his grantor. But if the cov-
enantor is not vouched in, he is not concluded by
the judgment given against the deft. For the question of
title is still open & he might prove it in himself
notwithstanding the recovery. but if he is vouched
in, whether he appears or not he will be concluded
by the judgment. Gilb Et 28. Nolo 22. 1 Bac. 532. 1 Roll
396. Peakes Et 39.

In Comm. this procuring of notifi-
cation or vouching in as well as well is explained as defining
a writ when the interest in question is in chattels as a freehold
& there is no reason why the writ should be limited to freeholds
as in Eng. 1 Inst. 101 365. a. 1 Bac. 523. Peakes Et 39.

The particular form of giving notice in Eng. practice I
am not acquainted with, but ours, which I suppose
is substantially like it, is by a species of summons issuing
from the court calling a writ of voucher giving notice
of the existence of the suit and notifying the covenantor
to appear if seen, taken & defended.

Quit claims stand as they are more usually
called means, contain notice of those covenants
of which I have been treating. for if a deed contains
notice of them, expressly or impliedly it is not a quit claim.

It has been said & determined in Con. that the quit claim
ant might be made liable in an action of deceit for fraud-
ulent representation of his title or the quality of the land.
test in *Bedale* case. (*Salmon v Shrewsbury* in Ct. of Errors)
it was determined that it would not lie in case
of a conspiracy for the purpose of defrauding. 2 Day. 128.

Since in Eng. the rule is the same in effect, i.e. it is said
that a purchaser of land or other realty must protect
himself by covt. for it is said every purchaser must resort
to the title deeds, for on them he should only rely. or if he
wishes insurance as to title or quality he must exact
in covenants. & not rely on an action of deceit for
fraudulent representation as in the case of person-
al chattels. *Salk.* 211. *L'Esperance* 118. *Cw.* 8th 196380.
3 T. Rep. 51

It seems however that the rule is not fully estab-
lished in Eng. for by *Hargrave* the contrary doctrine
is holden. i.e. that action will lie for a fraudulent mis-
representation (which the warranty or covt. does not reach as
it now does in quit claims) when the seller conceals the
instrument or fact which occasions the defect, or con-
ceals an incumbrance to which the estate is subject.
1 Inst. 384 a note so in *Cum. Dig.* tit 38. Chap. 5. sec. 5.
1 Font. 366. so also in *Coxius* 393. These authorities

go to show that an action on the case in nature of an action of deceit may be maintained in such cases.

During the rage for land speculation in our country some years since there was a great deal of fraud practiced. Sellers would even title when they had none & to induce purchasers to take deeds would make many fraudulent misrepresentations as to the value & situation of the land, & draw maps of lands. streams &c that never were in existence. carefully however avoiding covenants which would subject them.

Now admitting that the Eng rule is correct. I am inclined to think that such an action ought to be maintainable here. In Eng a man need not be deceived unless he chooses it. But the needs of our forest cannot be supplied by any purchase the means of information are so few & the opportunities to defraud so numerous that in my opinion good policy requires that such actions should be supported. And as cultivated lands are continually increasing and it seems to me that such sales should have the same protection for fraud as well as the sale of any other property. The situation of Eng is however different in this respect & the rule may reasonably be different.

There is another species of covenants that requires distinct consideration viz. Coven^{ts} to pay money by installments.

On a bond conditioned for the pay^{mt}

of an aggregate sum of money by installments debt lies
upon a breach in non payment of the first installment
of the debt covers the whole principle. 1 alk. 118. 1 Wils. 80
Gtra. 515. 814. Cro. J^h. 558. Esp. Dig. 205

See Coke lays

down a rule directly to the contrary in 1 Inst. 47. b. 292. b.
10 Co. 28. b. or 128. b. Where however the word is there
used it is to be understood as referring to a single bill
1 Ann. Pl. 548. Esp. Dig. 205. Roll. Ct. Pl. 168.

Indeed

the very structure of the bond shows the rule to be correct
as I have laid down. the bond runs thus. "I A. B.
acknowledge myself fully bound to C. D. in the per-
sonal sum of \$1000⁰⁰ There is an absolute debt payable
instantly, in the condition it is provided that "I A. B.
shall pay to C. D. \$100 at the end of one year, \$200 at the
end of two years &c. then the bond is to be void." and on
no other condition than pay^t according to the terms of
the condition can the obligation be avoided. If then
A. B. omits to pay thus. the principle is forfeited. & there
is the ground on which an action of debt lies for the first
payment.

But with regard to a single bill the rule is dif-
ferent. for upon that debt which is the appropriate action
will not lie until all the installments have be-
come payable. 1 Roll. 601. 1 Inst. 47. 292. b. 10 Co. 28. Esp. Dig.
205.

Thus "I A. B. acknowledge myself indebted to C. D. in the
sum of \$1000. to be paid thus \$100 in one year. &c" for ten
successive years. Then the aggregate debt of \$1000 is in-

ture & indivisible and then cannot be the actions of
debt on this contract, the agreement is to pay \$1000 and
then is no condition annexed to accelerate the payment or
to create a forfeiture of it, if there were it would of course
come within the first rule as to penal bonds.

By our stat.
as to suits on penal bonds conditional for the payⁿ of
a debt at several times or by instalments the courts of
law are allowed to chance the penalty, so that the
Deff recovers only his actual damage. Thus if Deff pays
for the first instalment, he recovers it, but he recovers that
alone, he may then bring scire facias on that judgment
& have execution for the other instalments as they become
payable. This however is a mere statute regulation & is
contrary to C. L. H. C. 35.6.

But on the other hand
if rent is reserved at so much in annum, payable however
by quarterly instalments, an action of debt lies for
each receipt payment, in other words an action
will lie at the end of each quarter. Now it
may be asked what constitutes the difference between
payⁿ of rent by instalments & of a single ^{bill} in the
same manner? an aggregate payⁿ of a particu-
lar sum is to be completed on each at the end of the
year.

The difference is this, the aggregate sum in the sin-
gle bill constitutes an entire indivisible debt as before
explained but rent is considered as the reservation
of a part of the issue of the land which shall have
accrued at the day appointed for payⁿ. The year is

merely a measure furnishing a ratio or portion. But the great leading difference is, that the quarterly reservations are in the nature of distinct debts. I do not all together constitute an entire debt as in the case of a single bill. Indeed if such payable quarterly could not be collected when due, that which is payable yearly for a term of years could not be collected yearly, but the whole must be collected at once at the end of the term, which would be extremely inconvenient & expensive. 3 Co. 22. 10 it. 128.

On a cov^t or note for the pay^t of an aggregate sum by instalments an action of cov^t broken or a^pt. will lie when the first instalment becomes due & so forth &c. But on the other hand debt on the cov^t or note will not lie until the last instalment becomes due. Cro. Eliz. 175, 770. 867. Cro. J. 105. 3 Co. 22. a. 2 it. 94. 2 it. 153. Salk. 165. Bull. c. 1. § 156. 1 Hen. Bl. 547. action on first hand of the rule Cro. Eliz. 118.

The rule you perceive is different as to debt on penal bond or single bill & on notes or cov^t covenants. On this subject there is a great deal of confusion in the books arising from want of proper language. There appears to be no discrimination between bonds & single bills or between cov^t & notes & single bills, nor any precise rule of damages.

To repeat the rule then. On a penal bond conditioned for the pay^t of an aggregate sum by instalments debt will lie on failure of pay^t of the first in-

statement and the whole penalty will be recovered.
On a single bill debt will not lie until the whole
bond or all the instalments have become payable.
In note or covenant an action of ass't or covt
broken will lie when the first instalment becomes
payable & no other quotes the diff in coming in
each instalment but which is due at the time. The
debt will not lie until all become payable

The difference in these cases arises from the form of
the action & their different provisions. Covt broken
or ass't is bro't to recover damages or the loss actually
sustained & not more. Debt to recover a sum
certain in number. Covt broken then or ass't will lie
for recovery of the first pay^t but debt will lie
only for the recovery of the whole debt i.e. not until
all the instalments are due. Unless indeed in the
case of a penal bond when debt lies on failure to pay
to pay the first instalment, and the whole is recovered.
[I think the distinction would be clear & easily understood, if the
action of debt on penal bond were described as an action
for the recovery of the penalty of the bond which became
forfeited on the failure of payment].

If there is a cov't or note to pay several sums at different times
there being no aggregate in the case it is clear that an
action of covt broken will lie for the first payment &
so quotes toties. And I conceive that debt will lie
for each successive part. tho I know of no such deter-
mination. Thus, a covenant to pay 10. 500 on the

1 Jan'y. 1818. & \$100 on the 1st Jan'y. 1819 &c. Now this
can not properly instalments of the same debt, there is
no aggregate stated. They are in the nature of an instalment
distinct debts. That Court broken would in appearance
by from the former rules you may see however. Bull
et. P. 168. Cro. Eliz. 776. 807. 118. 1 Ann. 26 550. 1 Inst.
292. b.

There being no aggregate in the case it can make
no difference whether the obligations to pay these sev-
eral sums are in one instrument, or in two or ten.
The difference between the two cases is that here there is not
as in the former an aggregate debt divided up into
several payments, each sum here separately constitutes a
distinct debt, indeed the case is hardly like that
in which c & c covenants to pay £2. ann. annuities or
\$100 on each 1st of Jan'y. that is to follow for five
or ten years. For this reason I think the debt
lies in this case for each payment as it becomes due.
but for this as I before observed I have no authority.

A clause in a covenant that on non payment of
any one instalment the whole debt shall immedi-
ately become payable, is void. e.g. a covenant to pay \$1000
in ten diff^t instalments, with one express stipulation
that if covenantor fails to pay the first or any subse-
quent instalment at the time appointed the whole
sum shall immediately become payable. Chit. Bills.
212. 213. In Cro. P. 505. there appears to be a differ-
ent opinion expressed. but the rule I conceive to be
correct.

Of the rights & liabilities of the Representatives
of the original parties in the covenants.

In the language of the 6th. the personal representation
of cov^r as his Ex^t. admits is implied in himself
the meaning of the rule is that they are bound
as matter of course without being bound
by these covenants by which he himself is bound.
This rule however is not universal. 1 Hall. 519
Ly. 14. a. 2 B. & W. 197 1 Ser. on 125.

Fiduciary
contracts are exceptions to this gen^l rule & e
where there is a personal confidence reposed in
the covenantor or party contracting, as in case
of an institution of a apprenticeship the master
covenants to instruct the app^r. If the mas-
ter dies the Ex^t is not bound to instruct the app^r.
For he may not be capable of doing it & the per-
sonal confidence was reposed in the master as to his
capability which is not transmissible. Cro. El. 553.
1 Sid. 216. Com. Dig. Cov. 6. 1. 2 ellod. 269.

But the
personal representative of cov^r is liable even in case of
fiduciary contracts if the cov^t are broken in
the life time of covenantor or immediately af-
ter the breach of the cov^t a right of action accrues
ag^t the cov^r & this claim is ag^t the personal
heir. then as the personal estate of the
personal representative is liable the representative is liable
even if cov^t be broken after the death of the cov^r. Com. Dig. 3. 1

In an estate devised to the wife and his heirs at law
by a will. Thus it is a covenant to assign land to B at
a given time & dies before that time. But will compel
the heir to perform the covenant. In such the case
money will go to the Ex^r Dyer 338. 2 Vern 213.

And indeed it is a good rule that courts will bind the heir
of a covenant. And on the other hand descend to the heir
of covenants, as in the last case if a covenant should
die before the time of performance his heir would
enforce the covenant. Bull. 144. 158. 1 Kew 520 Fitz 2363
Esp. Dig. 274

And the heir of the covenant may sue
upon a covenant that not named in the covenant if the
covenant runs with the land & was intended to continue
after his actually broken after a covenant is made.
Thus if a lease covenants with life that he will have
the lands & tenements in reversion before the expiration
of the term the life dies, now if at the expi-
ration of the term the premises are out of repair
the heir of life may sue a covenant in the covenant
against life. For as the breach happens after life's
death the heir is the person injured 2 Lev 22. 305.
Calk 141. Esp. Dig. 274. 5.

Again, if a covenant
with "B & his heirs &c" for quiet enjoyment &c in a
covenant as of an inheritance & the covenant is broken in
the life time of B. To be sure the heir of B has the
action in the covenant - and this is the case even though the
ex^r was not named in the covenant - The difference

Between the two cases last stated is this. In the former the
cov^r was not broken until after the death of cov^r so that
the him alone was injured. But in the latter case
the lessee B became entitled to damages during his
life, which damages if recovered would have gone
to the personal funds to increase that A's for &
go to the Ex^r. Therefore the action does to recover it.
and the distinction is given. 2 Lw 26. 1 Vent 1634.
Wall N.P. 158. Cop Dig. 295

Again if upon a cov^r of
warranty the him at law of cov^r is made after the
death of the cov^r the right of action belongs to him
for the cov^r runs with the land. ib. etc.

The Ex^r of
cov^r the not named is always liable for a breach
of the cov^r during the life time of the cov^r &
the rule holds even if the cov^r is a real one as con-
tra distinguished from a personal cov^r. Thus suppose
A conveys to B with cov^r of seisin at day & afterwards
it is discovered that he had no title. now if the
breach of cov^r happens during A's life for it is broken
so instantly it is made, A his Ex^r is liable or may be
liable for the claim of damages upon ag^t the
cov^r (et) which was ag^t his personal funds & had
the claim been enforced it would have diminished
the personal funds which by the death of A comes
into the hands of his Ex^r the action on the cov^r should
therefore lie ag^t the Ex^r. In some cases this action may
be brought ag^t the him at law.

as the action will also

being the case in 20. & the court is not liable it is not broken title after court's death if the court is spent but not otherwise. - For by the first grant into the person's representation of court and implied in himself & this is on the principle of privity of court: the court being exhaust. 1 Rolle 517. Com. Dig. Law. Lit. Geo. 553.

But on the other hand if a court in law is an implied court the Ex^r is not liable if broken after the court enters death. e.g. for a breach of the court is pleased to the words "give grant demise do" he is not liable the court is spent. For in this last case there is a privity of contract extending to the next person in the former implied court. The right of recovery is founded on a privity of estate but the right has come the next person is to the heir at law. It follows then that the Ex^r is not liable for the liability follows the right into the hands of the heir. Cro. Eliz. 157. 1 Rep. 533. 257.

If an Ex^r or Ad^r comes into possession of a lease for term years in his right capacity, he may be constituted as a assignee of the term & may be sued as such pro deserv. in the debt. For he is virtually a assignee by operation of law, and is liable for breaches occurring during his continuance in possession on the ground of privity of estate. 1 Will. 4 1 Talk 317. Esp. Dig. 246.

Of the liability of the heir of the covenantor. It is a general rule that if the heir is named in the covenant has not spent his debt, he is liable for breaches of the covenant before or after court's death to the extent

of those assets but no further. 1 Fort 357. 1 Inst 365. 370
373. 384. 2 Bl. 378. Est Dig. 244.

I would have shown, too
it is a rule of practice only that to an action ag^t the heir
at law for a breach of cov^t of his ancestor, if an ex^r is
no bar, for the heir is not sued upon any contract
of his own, but upon that of his ancestor who was
sui juris & he cannot be made personally liable
but only as to the property which has descended
to him & on that account. 4 T. Rep. 77.

As to the
it is a rule of practice as to the liability of those heirs and
it has once been determined many years since, that the
heir at law as such is liable at law on his ancestor's
cov^t of rising up & served in the cov^t & has a right by
descent. — The principle of this seems to me ques-
tionable. It is a good & good rule, the heir is certainly
bound at C. L. & cov^t may sue him on the right of
his election. But it is contrary to the genius of our
statute law. As the cov^t of rising is broken during the
life of the ancestor I should ^{not} think the heir could
be liable for it is the duty the executor of the
testator's right to satisfy all outstanding claims
against the decedent & the law looks to the ex-
ecutor. It is to be done under the order of the court of
Probate. If the heir is made liable it changes the
whole system. I submit that at C. L. the heir is liable
that it is a difference whether the breach hap-
pens before or after the death of cov^t. You have that
makes the duty of heirs after satisfaction of the

for that the devisee cannot act.

As to the liability of the court of warranty when the breach happens after the death of the testator, there can be no doubt but that the heir at law is as much liable as the testator. As to the liability of the executor, it does not rest on him, but bears it as at the testator's death.

Of courts which run with the land & collateral courts.
A court is said to run with the land, as I understand it where the obligation created by it, passes upon the assignment of the interest so as to devolve upon the assignee or in other words it, passes with the title.

On the other hand those courts which do not run with the land, do not pass with the interest and are called collateral.

Out of this distinction there arises a diversity as to the liability of the assignees upon courts used in conveyances.

The first general rule is that the assignee of a lease &c is liable for the breaches happening during his own possession or term even though not named provided the court runs with the land. But if the court is collateral the assignee if not named is not bound.
1 Font. 345.

In enquiring then, in what cases does the obligation pass with the interest, & in what not, & why it is essential should be understood.

This first to

be observed that when the thing covenanted to be done
or concerning which something is covenanted to be done
was in effect at the time of making the covenant
out of the subject covenanted about the covenant
with the land. Thus if I lease a house to B who
covenants to repair this court room with the land
or house for it relates to something in effect at the
time of making the lease viz the house. And
if B should assign to C. C. would be liable for all
repairs necessary during his time & the rule
holds tho the assignee be not named in the covenant.
1 Roll 521 Co. Ely. 45. 5 Co 16. b. 24 a. b. 4 Co 80.

So also

a covenant to lay out is said to run with the land, for
altho in fact it is not in effect at the time of making
the lease, still in legal language it is held to relate
in effect for the land out of which the rent is to
issue is actually in effect. So that an assignee is li-
able for what rent is covered during his time Co.
Ely. 383. Moore 35. Bull. et P 159.

But on the other hand

if the thing covenanted to be done or concerning which
something is to be done was not in effect at the time
of making the lease or was not part of the
subject leased the covenant is collateral & of course
according to the distinction above the assignee
is not bound by such covenant unless named or in-
volved in a case of name. Thus suppose B the lessor
covenants to build a house or now by a certain
time & in the mean time he assigns to C. C. is not

liable unless named. For the cove. is collateral it re-
lating to a thing not in use at the time of the lease
but to be created afterwards. 5 Co. 16. 2 Burr. 1271
3 T. Rep. 378. Cro. Jac. 552. 1 Bac. 534

On the other hand a cove. which goes to the support or
preservation of the thing demised runs with the
land & the assignee is bound as the not named
of the description is the cove. to repair but not a
cove. to raise a new building.

So if the tenant should cov-
enant to have yards or any acres of land con-
tiguous the cove. would run with the land for its
use to its preservation. So that should assignee
though a greater sum than was stipulated
he would be liable. 3 Lev. 233. 5 Co. 1. 18. 2 Ll. b.
Cro. Jac. 125. Ray. 303. 2 Kent 228. 332.

In laying
down the two first rules upon this subject I observed
that the assignee of a lease is liable for breaches oc-
curring during his term whether named or not pro-
vided the cove. runs with the land. & 73. & if the
covenant is collateral & does not run with the
land if the assignee is not named he is not bound
for such breaches.

3 When assignees are named they are
obliged as joint tenants to observe all the covenants whether
they run with the land or not. 5 Co. 16. b. 1 Bac. 534
Thus if A leases to B. B covenants for himself & assigns that
he will build a wall within 15 years. and B assigns

to C. If b holds before the time fixed for performance has expired he is liable for a breach of the cove. The assignee who accepts a lease in which he is named & he is bound by the covt. respecting the thing demised.

But a covt. to be binding on the assignee in these cases must be to do a thing which relates to the thing demised or subject matter of the lease, otherwise he is not bound at all he is named, in other words he is not bound to do an act foreign to the demise as to build a house or wall, to plant an orchard, dig a ditch &c upon other ground than that demised. The rule is the same in case the original lessee covenants to pay a sum in gross or a collateral sum different & distinct from the rent. Cro. Jac. 438. 1 Fent. 352.

This was why the assignee is not bound i. that there is privity between him and lessor except that of estate and it is only on the ground of that privity that the assignee is ever bound at all, he is not bound by privity of contract. And here an useful case where the covt. is to do an act foreign to the thing demised there is no privity of estate the assignee has no interest at all in the thing covenanted, & bound, such a covt. then is purely in the nature of a separate contract between lessor & lessee.

But when the assignee is bound by these covenants according to the distinctions taken above, he is liable for

such breaches only as accrue during his own possⁿ or continuance of his title. If the breach had happened before he is in no case liable altho he be named but must be made to the orig^l lessee, the assignee not having had at the time of the breach any title or interest. 2 East 575. Holt. 177. Tulk 199. 3 Barn. 1271. 2 Harg. 388. 1 Famb. 355. Long. 442.

^{the} obligation of the assignee is founded on the words of the lease and he is bound because he takes the interest to which the covenants are attached of course his liability can be constituted only with his interest & cannot commence before nor continue after that interest.

Since if before the lease is made a house is built within 10 years, the time having expired and the court not informed of the assignment, the assignee is not liable altho named for the breach had occurred & the right of action was complete before the assignee's interest commenced its course.

Again an assignee is not liable at law for breaches which accrue after he has assigned or transferred his interest to a subsequent assignee. and so far is the rule carried that if he assigns the very day upon the rent becomes due he is liable for no part of the rent. See the 177. Long. 735. 3 Co. 22. 1 Tulk 81. 31. Powdell 90. Bull. 159. 4 Harg. 71.

The reason is that as long as the rent is due until the day next arrives, the whole aggregate reservation accrues on that day & not the

minutes' fraction is done before. This rule however does not affect the holder. For he is liable as to his own part of the debt, if it is not paid by the assignee at any distance of time.

It is also that the assignee is not liable for any part of the debt accruing after an assignment to a subsequent assignee is a strict rule that has been so rigidly construed that it is not held that the assignee is insolvent. According to some opinions it is even for the very purpose of defending the assignor. The principle is applied to an assignor that if he assigns to a assignee by a sham conveyance, he would still be considered as the tenant & liable for the debt. The weight of authority however I think is the other way. *Chambers 485. Stra 1221. 12. 166. 1 B & P. 22* — It is contra that an assignment by fraud will not protect assignee 1 Vent 329. 331. by this with fraud may be refuted & the application would be good. It seems however to be questionable how unless indeed there was a continuance of possession after a sham conveyance.

And if assignee should assign to a firm covent who cannot bind himself to the payment of the debt the rule is precisely the same. *Long 435. 485.* — The reason is that the assignee is liable on the ground of his duty of state only & not his duty of contract. and the principle is of general application, altho it sometimes looks as a hard case.

It seems however that a court of equity will not allow the assignee

to account for the rent during the time that he
was in possession so that if the subsequent assignee is insolvent
rent the assignee may be compelled to pay his rat.
1 Fent. 351. 3. 1 Term. 87. 8. 165.

Why then a court of Chancery in any circumstances is restrained a lessee by assign-
ment from assigning to an insolvent person has been
stirred but not settled. Whether the assignee could after-
wards be subjected is another question. It seems dif-
ficult to discover a principle for such an excep-
tion, it would be strange to say that a man
should not assign his interest as he pleases because
it might be injurious to a third person. Yet from
the expression in the books it is a doubtful point.
Chancery may not do it. 2 Atk. 219. 1 Fent. 351.

If the assignee be evicted of part of the premises
or subject dissolved he may be compelled at law
even, to pay rent for the residue of which he re-
mains possessed. For this case the rent may
be apportioned. 2 East. 575.

Why then it may be as-
ked account the rent be apportioned in case it is pay-
able yearly & the lessee assigns at the end of 11 months.
He be compelled to pay $\frac{11}{12}$ of the rent. The rea-
son is before given. no part of the rent accrues until
after assignment. but in the last case where the
assignee is evicted of part, he remains in possession
of the residue until the day of payment arrives and
therefore the rent may be apportioned in a c. of law.

So also if the original lease be voided of a part of the
reputed amount as of 50 acres out of 100 claimed
he may be compelled to pay rent for 50 acres in
an action of debt tho he could not in court have
been 3 Co 22 a 2b. 2 Co 575.

The reason of this device
is that debt for rent against lessee is a charge
is made in priority of estate which in the case
supposed amounts to 50 acres. whereas court
broken is founded on priority of contract merely. & an
action claimed on a personal contract cannot
be apportioned, but in debt the party may be sub-
jected pro tanto.

It was formerly doubted whether
a court by a lease not to assign was in law bind-
ing upon him, it being supposed as against the
nature & incidents of such an estate. That
doubt is now removed for it has been frequently
decided that such a court is binding & if the instru-
ment be properly framed the estate is forfeited on
the breach of it & reverts to lessor. 2 Eq. Ca. 100.
3 Wils. 237. Cowp. 133. 803. 8 T. Rep. 57. 60. 800.

Such
a covenant however is broken only by a voluntary
assignment on the part of the lessee. if then
the interest is taken upon execution by lessor's
creditors the court is not broken. this is the con-
struction universally given to such covenants.
the law acting in invitum 2 Eq. Ca. 100. 7 Vin.
85. 8 T. Rep. 57. Style 483. 3 Wils. 237.

It is such a covt. broken by an under lease of part of the term. i.e. of the unexpired residue of the term for that is not in legal language an assignment. ib. ant.

Neither is it broken by a devise of the term to take effect from the death of the divisor, altho it is voluntary. For it must necessarily go to the next or legatee. therefore such devise is no violation of the covt. 2. Bl. Rep. 766. 3 Wils. 234. 8 T. Rep 59.

Indeed it may safely be laid down as a general rule that such covenants are not broken by any assignment effected by mere operation of law as when the party commits an act of bankruptcy, felony or treason, or becomes an alien enemy. For the covt. is considered as contemplating voluntary assignments only.

I have considered the cases in which an assignor is liable to lessee & I have further to show that the lessee continues always liable on his express covenants even after an assignment. the liability of the assignee notwithstanding. You perceive then that altho the lessee can create a relation which may subject the assignee, yet he cannot exempt himself from his own express covenants as when he stipulates that rent shall be paid or repairs made at all events. 3 Co. 22. 3. Rep. 120. Doug. 443. 4 T. Rep. 98. 100. Salk 199. 1 Font. 353. 4 1 Sm. 436. 439.

What if the lessee has accepted the

assignee as his tenant as he may do as by accepting suit
of him &c. he cannot afterwards maintain debt for
rent agt. the orig. lessor because debt for rent is
founded upon privity of estate & then his act has
concurred with that of the lessor to determine
the privity of estate between themselves. Cro. J. 334
360 23. a 26. 1 St. Pl. 439. 444.

But when there is an
express covt. by lessor for paymt. of rent he is liable
in covt. broken for rent altho the lessor has accepted
the assignee for his tenant: for then the covt. being
express the privity of contract remains altho the
privity of estate is determined by the acceptance
Cro. Jac. 309. 522. Cro. Ch. 188. 1 Sid. 402. 407.
1 Saund 237. Bull et P. 159. 1 Font. 354.

But when
there is no express covt. the lessor can maintain no
action agt. the orig. lessor for any claim or fail-
ure whatever after he has accepted the assignee
as his tenant. If then he has accepted
him he cannot subject the orig. lessor in any form
of action whatever, either covt. broken, or debt, on
the implied covt. for this covt. is founded in priv-
ity of estate which the lessor joined with the
lessor to determine. I am speaking here you will
observe with reference to subsequent breaches as
to those which occurred before the apt. he must
remain as he was liable. Cro. J. 522. 1 Sid. 447.
1 Str. 436. 437. 439 note 36. 22. 1 Font. 354. 1 Saund
241. b.

I should here observe by way of explanation of terms that the lessor may accept the assignee as a tenant not only by receiving rent of him, but by expressly assenting to accept him or by any act which signifies such an assent. 1 Hen. Bl. 408. q. 4389.

When the court for rent is express so that the lessor's liability continues after assignment, the lessor may bring his remedy on the court ag^t the lessor & the assignee at the same time in diff^t actions, i.e. he may sue either or both, but he can enforce only one execution or both so as to recover more than one satisfaction to the amount of the rent. & the costs of both suits. And if after satisfaction on one execution he presents the other receipt for costs, the party may be relieved by an audita querela & discharged on pay^t of a tender of costs only. Cro Jac. 523.

I would further observe that by stat. 32 Hen. 8 which is an ancient statute *prima facie* binding men, the grantee of the lessor or of the reversion as more usually called has the same remedy on covenants running with the land as the orig^l lessor himself had according to the distinction above taken, he being placed precisely in the lessor situation. At C. L. it was supposed he had not this right.

And by the same stat the lessor shall have the same remedy ag^t the grantee of lessor as he had ag^t the lessor himself according to the distinction above taken, i.e. precisely the same

as in *2nd* at C. L. ag^t sing^l lessee 1 Inst. 215
Cro. Jac. 522. 3 Co. 22. 4 Bac. 279.

In explaining
the liability of the assignee of a lease I observed that
the rules subjecting him did not extend to a deriva-
tive lessee or subtenant. the difference between
them I did not explain.

An under tenant or a
derivative lessee is one who takes a conveyance
of only a part of the unexpired residue of a
term. He is now considered as an assignee. Thus
suppose A leases to B for 20 years. at the end of
10 years B assigns the whole residue to C. then
C comes in the place of B & is an assignee. But
if after 10 years he had made a lease to C for 5 years
or any other time short of the whole residue C
would have been a derivative lessee & not an as-
signee — and a derivative lessee may take
the whole residue of the term & still retain
the character of deriv. lessee. provided he takes
as tenant to lessee & not to lessor. So that the
definition of a derivative lessee should be one who
takes a conveyance of only a part of the un-
expired residue of a term or who takes the
whole residue as tenant to lessee. Long. 174. 3 Mth
234. 2 V^{ol}. Rep. 756.

I again observe that such a de-
rivative lessee or under tenant is not bound
by the coven^t in the orig^l lease as an assignee would
be according to the rules above laid down.

The reason is that as between him & the lessor there is no privity: none of contract because he was not a party to the original covenant; none of estate because he holds under lessor who is his reversioner & landlord. *ib. ante.* & 1 Fout 347. 8. Doug. 438.

The rule was formerly held to be the same as to the mortgage of the whole residuum of the term unless he took possession i.e. that he was not liable upon the covenants of lessor who was his mortgagor, because he took only as an incumbrancer & not as a purchaser. But it has since been decided that the mortgage of the whole residuum is liable on the covenants precisely as a purchaser is, whether he be in possession or not. for the old rule see Doug. 438. 1 Ann 736. 114. 1 East 502. contra. 1 Ky. Jan. 235. on the diff. opinions in 3 Bro. Cha. 166. 1 Ky. 12. 3 Ch. 512. 4 T. Rep. 306.

From what I have observed you will perceive that the difference between an assignment properly so called & an under lease is that an assignment is a sale of the whole of lessor's interest, but an under lease is the creation of a tenancy under the lessor, the assignee is a tenant of lessor & there is a privity of estate between them but the under lessee has no such privity with the lessor. & even he is not bound by the covenants in his favour, altho the lessor might be. *See* 205 3 Wils. 234. 2 Wils. 766.

Assignees properly so called are liable according to the distinction already taken

whether the apt. be by deed, devise, sale under Ex.^r
or as it would seem by any other mode of transfer
by operation of law. Thus if lessee becomes a bankrupt
his lease is ipso facto transferred, so if he
dies it is assigned by law to the Ex.^r or ad.^r & it seems
to make no difference whether the transfer be by
operation of law or the act of the parties. Doug. 177.

It has been made a question whether an assignee
of part of the subject of a Lease (not of the term)
is liable for rent or any part of it. or in other
words whether the rent can be thus apportioned? Thus
A leases B 100 acres. B assigns to C 50 acres. Can C
come upon B. for part of the rent? Co., Eliz. 633. 766.
From analogy to a recent decision it would seem
that it might be thus apportioned. for it has
been decided that when an assignee is evicted off part
of the premises he may be compelled to pay
rent pro tanto in this way the rent may be ap-
portioned. (2 East 577) The analogy between the
two cases is so strict that I should think the rent
might be apportioned in both.

If lessee cove^t
for himself & assigns - as long as they shall be in
pos^{ss}ion. Or if his assignee continues in pos^{ss}ion
after the expiration of term he is liable on the
cove^t altho at that time not strictly lessee or
assignee yet being so de facto he is liable as
such on the covenants thought to be subject. For
one, he is not to be allowed to assume the character of

lessee or assignee to receive all the benefits & then announce
it to avoid the liability. Plite 2107. 2 Com Dig. 564.

Thus far of those covenants which do & those which do
not run with the land.

There is another species of covenants
which require a distinct consideration viz. Covenants or bonds
(for they differ only in form) to save harmless.

A covenant
to save harmless may, I trust, be defined to be one
by which the covenantee covenants to secure or indemnify
the covenantor against some loss, damage or
charge to which the covenantor may be exposed,
as a covenant by a principal debtor with his surety or in
a bond of indemnity or counter covenant.

I would observe
first that these covenants are not broken by the tortious
acts of another, they appear to be somewhat in the
nature of a covenant for quiet enjoyment, which you
will recollect are not broken by tortious entries and
trespasses.

So if the creditor should falsely imprison the
surety & covenantor, the covenant is not of course broken
tho a lawful enforcement of the claim against
the surety would be a breach.

So if an assignee
covenants to save the lessor harmless from any claim for
rent & the lessor illegally distrain it is not a breach
1 Roll. 434. 4 Co. 80. Bro. Ch. 443. 1 Mod. 219.

On a
covenant to save harmless the covenantor may in

some cases maintain an action ag^t cov^t on the ground of his own liability to a suit, because the cov^t has suffered him to become liable, and this is usually the case when the cov^t's liability accrues after the cov^t. of indemnity was executed. Thus a Shff takes a bond or cov^t to save himself harmless ag^t the escape of a person having the liberty of the goal yards. If the prisoner escapes the Shff may bring his action immediately altho he has not yet been subjected. for he was immediately liable even to the custⁿ whether actually damaged or not. & on this ground he may sue. the liability being deemed in construction a breach of the cov^t. See. 61j. 53. 123. 1 Root. 510. 11.

So also if a surety for a debt to be paid in future takes a cov^t. or bond of indemnity from the principal debtor & the debtor fails to discharge the debt at the time appointed the surety may sue on the bond immediately because this liability is a breach. Thus A as debtor & B as surety give an ob^l to C. to be paid 1 year hence. at same time A executes a bond of indemnity as to save harmless to B. now if A does pay the ob^l at the end of the year according to the terms of it. B may immediately bring his action upon the bond altho he has not been compelled or called on to pay the debt. 2 But^t. 234. Talk 196. 5 Co 24. a. 1. Root 507 25 Rep 100.

The subject occasioned a deal of confusion in some some years since

But suppose that after the surety has recovered of the principal, the cred^r also collects the debt of the principal so that the surety is not called on at all. the principal only remedy is by bill in Eq^t. stating the two judg^s & attendant circumstances & that the surety ought not in conscience to retain the money. The court of Eq^t will consider him as a trustee of the money & decree repayment.

It has been made a question whether indebt^d would not lie for this money ag^t the surety. I am clearly of opinion that it would not. For by the principles of the 6. d. there is no case in which an action will lie when the object & necessary effect of a recovery will be to impinge on former judg^s. The case of all ows and all^d Garland & Barr 1005 does not apply. that case has been questioned. see 7 T. Rep. 269. — J. R. R. thinks differently I believe on moot questions. The supposition which states case in Barron's proceedings is correct, but the authority of the decision has been much questioned. see 2 Hen. Bl. 414. 416. where it is expressly denied. 7 T. Rep. 269. 1 Day 130. 1 Hen. Bl. 65. 11 T. Rep. 182. this case you see the implied concession that it is not law. (vid. 3 Barr. 1354.)

If one having obligated himself as surety, takes a bond of indemnity after his liability as surety has attached, he has no right of action on the bond until he has been actually damnified. Thus in former case on opposite page: if A had executed the bond of indemnity to B before the oblig^d of A had become due. So too if the bond were by single bill payable instantaneously or by promissory

note payable on demand, the surety must have been
actually, sacrificed before he brings his action, other
wise there is an evident absurdity in the law. the object
of the bond clearly being to insure against damages
that are to arise in future by some act of the principal.
For if the covenant in this case could run on
the ground of mere liability, the covt must be consid-
ered as broken so instantly that it is made & the
covenant immediately liable which is not the
intention of the parties. See 8 G. 53. 123. the distinc-
tion is clearly laid down in 1 Galt 196. 5 Co 24. 2 Bulst
234. Keat. 570

If the surety having no bond of indem-
nity is obliged to pay the debt immediately he may main-
tain Indeb. Ass. against the principal as for money
paid laid out & expended for his use

But if he has
taken a bond the implied contract of indemnity is
merged in it & to this he must resort as his higher
remedy. Comp 5257 2 T. Rep 100. 1 T. Rep. 599. 3 Wils
13. 262. 346.

When there is no specialty taken by way of
indemnity the remedy of the surety ag^t the principal
is upon the implied promise of indemnity arising
out of the transaction & a right of action
in his favour out of pay^t of the debt or what is
equivalent to it being taken in 24th 1 Wils. 13.

The same remedy upon an implied contract exist be-
tween co-sureties for contribution when one has paid

the whole or more than his proportion in money being
indeb. aft. for whom two or more become cosureties, the
law raises a mutual reciprocal implied engagement
that if one is compelled to pay the whole the others will
contribute, & thus he may recover of each his aliquot
part. 2 B. & Pul. 268. 270. 3 B. & P. 228. 2 Day 492. 1 Vin 456

If however there are more than two cosureties the only remedy
between them is in Eq^y. because the actions would be
so complicated & innumerable that the concern could
never be adjusted at law. 2 B. & Pul 268. note.

There are two rules in regard to releasing of debts that
require mentioning. In the case of choses in action genl.
a release after assignment is in some cases good, & effectual
and in others it is not, i.e. in some cases it will operate
as a discharge, in others not.

On this subject the genl.
rule of discrimination is, that if the instrument
creating a debt is not assignable at law or release
there made after assignment will be effectual to dis-
charge it.

But when it is assignable or strictly nego-
ciable a release after assign^t will not discharge it.
Thus if A gives B a note not assignable, B assigns it &
then gives it a release the note is discharged, because
not being assignable the action upon it must be in
B's name of course a release from him must bar
the action.

If however the note was negotiable such a

release could have no effect. For the legal title is transferred to B the assignee or endorser before the release is given. so that B had no interest at the time the whole is in B. who is to bring the action in his own name.

In pursuance of this principle if lessor after an assignment of his reversion releases to lessor all the costs in the lease still the assignee of the reversion can recover for all the branches occurring after the assignment notwithstanding the release. For the reversion is assignable so that the assignee has the legal title & the action is to be brought in his name. 2 Lev. 206. Cro. El. 503 1 Fent. 345.

It has however been determined that a lessor can deprive his assignee of all benefit in the covenants in the lease by a release to the lessor the given after assignment provided it be given before action brought by assignee. but note if given after action brought for by commencing suit a right of recovery is attached.

Why such a release should ever be effectual I never could discover. it is contrary to principle & analogy that it should. the case supposes a court running with the land. the case is precisely that of a negotiable note. the legal title under the court passes with the property to the assignee by it is said that if assignee give a release before action brought it shall discharge lessor. however the rule is well established. Cro. El. 361. 503. 2 Roll. 411. Esp. Dig. 308.

It is a genl rule in relation to courts in genl that a release from covenants to covenantor, altho in the most genl terms as of all claims demands suits actions be given before the covt is broken, is no bar to an action on the covt. because at the time of the release there is no demand existing. Thus suppose such a release given from a lender to borrower who had entered a covenant of warranty. & the lender is afterwards evicted.

So too if a covenantor to build a house for 10 within 12 mos. down month after 13 executes to a release of all demands it does not affect the covt.

But a release of all demands & in terms equally genl. after it is actually broken, ^{exchanges all demands for the breach} and if one deed contains a variety of covts. some of which at the time are broken and some not, the discharge will be effectual as to the former only. Bull. at 43. 166. 1 Inst 292. b. Co. Sac. 99. Salk 171. Callen 38. 2 Show 90

But the genl rule before laid down viz. that a release of all claims demands &c. before covt broken, does not affect the covt. cannot as I conceive extend to absolute covenants for the future pay^{mt} of money because they create a debt in present and there actually is something to be released something in the nature of a demand. there is no difference in this respect between single bills, penal bills & covts. Whichever debt will lie I think the rule does not hold and a release of all demands will clearly release all unconditional engagements

or absolute instruments to pay money in future.

A release of all covts the incites before a breach ac-
curs will discharge a covt. of its warranty. to do any
act in specie or any other covt. & bar all action
upon them.

You will perceive that there is a manifest
difference between a release of this kind viz. of all
covts and a release of all demands. according
to the terms of this release it must act directly on the
covts. "I release to you all covts" such a release entirely
destroys the covts and of course taking away all liabil-
ity that was could accrue upon them. L. Ray. 518.
Ly. 57. Esp. Dig. 307.

Of Pleading in Covt broken. Under this head I
shall write to you the rules that are exclusively ap-
plicable or at least appropriate to this action.

The de-
clarⁿ in the action of covt broken must always state
that the Def^t covenanted by deed & this is an in-
dispensable argument because at C. L. a covt. cannot
exist except by deed or a writing under seal: of
course without such an avowment the declⁿ would
be ill.

And thus is this distinction to be observed that
when the instrument is under seal, covt broken
lies & is the appropriate action. but case or apt^t
will not lie. On the other hand on a contract
in writing without seal, case or apt^t will lie but

cove^t broken will not. because cove^t broken lies en-
ly on a cove^t & there can be no cove^t without seal.
Cro. Eliz. 517. Cro. Car. 108. 209. Stra. 814.

In an action
of cove^t broken very drst after setting out the terms
of the cove^t must allege a breach for without a breach
there is no cause of action. Most of the rules in this
part of our subject relate to the assignment of breaches

The first rule is, that when the cove^t is gen^l. a gen^l. as-
signment of a breach is suff^t or the assignment
of a breach may be gen^l. this rule will not hold
converso as to pleading performance. Thus if
grantor covenanted that he was well seized, it is
suff^t for covenantor to allege by way of breach
that cove^t at the time was not well seized, in the words
of the covenant, with a negation

So if one cove^t not
to buy or sell certain articles within a certain place
& time, simply averring that Def^t had sold to several
persons at several times within the period stipulated
is suff^t without specifying to whom. Hob. 176
La Ray 278. Salk. 139. Esp. Dig. 298.

The most gen^l. as^t
of a breach is in the words of the cove^t & this in gen^l.
is the more easy & better manner of as^t. as in the case
of a cove^t of seizure, the most gen^l. as^t is that cove^t
was not well seized, merely negating the cove^t. Cro
Jac. 369. 9 Co. 60. Esp. Dig. 299.

The breach must always

be so assigned or to appear upon the face of the record to be clearly & necessarily within the cov^t. Thus when upon covenants with lessee not to cut more timber than was necessary for repairs, an av^t. that Def^t had cut to the value of \$100 was held not suff^t. the law knows nothing of the quantity necessary for repairs. that is a question of fact. the value of timber necessary for repairs might have been \$1000. so it does not appear on the face of the record that the cov^t was broken. there is no cause of action apparent. the averment should have been that Def^t cut timber of a greater value than was necessary for repairs viz. \$100. Cro. Eliz. 348. Stilw. Doug. 203. Esp. Dig. 299.

If the Pl^{ff} after assigning a gen^l breach narrows or qualifies it by subsequent words, he is confined to it as thus qualified & must so confine his proofs. Thus when an cov^t to use the land in an husbandlike manner, the dec^t for a breach averred that "cov^t had not used the land in an husbandlike manner but had committed waste". If the words after "but" in the av^t. had been left out & so no qualification, leaving the gen^l breach. Pl^{ff} might have proved or shown any misconduct or neglect which amounted to a breach. but by that qualification he is considered as limiting the breach to that particular mode of using land in an husbandlike manner, and Pl^{ff} must prove waste or loss his action. For to this the issue is confined & for this only, Def^t supposed prepared the av^t. would have

answered Piff's purpose much better if it had been
"Def^t has not &c for he has committed waste."

3 T. Rep. 307.

When there is a proviso in a deed defeas-
ing a covt. in a certain event, the Piff need not set
out that proviso negation it, for it is in the nature of a
disfranchisement of which the Def^t may avail himself by way
of defence. Thus Def^t covenanted that he would deliver
certain goods by a certain time & such a place, provided
he was not prevented by the dangers of the sea. It was de-
termined that a simple aver^t of non delivery at the time
& place without more was suff^t & that the omission of the
proviso was no variance. On oyer the Def^t may plead that
the covt. contains a certain proviso &c & aver that he had
been prevented by the dangers of the sea. For as respects
the rules of pleading this proviso is precisely like the condition
of a penal, it is a disfranchisement which the Piff need not men-
tion in his decl^t. Ray. 65. Esp. Dig. 300

But the rule is diff^t.

as to an exception in the body of a covt. for the exception
must be set out & negated. A proviso annexed to a covt.
is properly a disfranchisement intended as a defence for the
Def^t. But an exception is a part of the covt. itself en-
tering into the description of the subject matter dis-
missed the decl^t would be ill on dem^r. Thus a covt^r
to convey to B. excepting the interest of A. this is not a
covt^r to convey a good title, without more. A did not intend
to convey the interest of A. the exception thus is clearly
a constituent part of the covt. an omission of it there-
fore would work a variance & the Decl^t might be demurred to
Esp. Dig. 300.

If a cov^t is in the alternative as to do one of two things the breach must be assigned as to both, otherwise the decⁿ will be ill. Thus when a lessee cov^{ed} not to cut wood without the assent or assign^t of lessor, an averment in a decⁿ that by lessor, that the lessee cut wood without his assign^t, was holden insufficient. For the lessor might have cut with his assent altho there was no assign^t. A proof of cutting without assign^t is perfectly consistent with cutting by lessor's assent. There is no breach upon the record. 1 Leon. 250. Esp. Dig. 300.

But covenants which virtually bind terms are in the alternative are not always so in legal effect & in such cases the last rule would not apply. Thus when one cov^{ts} to pay or to cause to be paid, it is suff^t to aver that that cov^{ts} has not paid, without saying nor caused to be paid, for causing to be paid is in effect paying & may be soplied in accordance with the maxim "quis facit se" and evidence that lessor had caused to be paid would support a plea that he himself had paid. 1 Sta. 229. Esp. Dig. 300. 301.

Again when one cov^{ts} to pay on one of two contingencies whichever shall first happen, an aver^t that one of them has happened is suff^t without averring it to be the first. Thus a cov^{ts} to pay 100 £ on the death or marriage of C. whichever shall first happen such an aver^t would be suff^t because whether it were the first or not is immaterial, as the first must have happened. 2 Rep. 132. Esp. 2301.

On a cov^t that an act shall be done by cov^t or his assigns, if an action be bro^t against assignee the breach must be laid in the disjunctive. thus, that it has not been done by the cov^t nor by his assigns for the cov^t might have done it altho the assignee had not.

But if the actⁿ was bro^t ag^t the cov^t it would be suff^t to allege that he had not done it without more for when the actⁿ is thus bro^t it is presumed that there has been no ass^t but when the actⁿ is ag^t the assignee there is no such presumption. Salk 139. Stra. 228.

The first rule then that the breach must be laid in the disjunctive is confined to actions ag^t the assignee Thus a lessee cov^ts that he or his assigns will build a house within 10 y^rs upon certain premises if the lessor is assigned & after 10 y^rs action be bro^t ag^t assignee the aver^t must be in the disjunctive. but if against lessee merely averring that he has not done it is enough. The gen^l rule that a party ought not to be obliged to shew anything more than a prima facie right to recover. he need not anticipate every possible ground of defence. thus could be no pleading if he were bound to make it certain "to verify intent in every particular" in the words of Coke

So if one cov^ts to do an act to a man & his assigns, as to make a conveyance. it is suff^t for covenantee to aver that cov^t has not made the conveyance to himself. an ass^t is not presumed & it does not appear.

But on the other hand if the action were brought by an assignee, it would be necessary to aver that the conveyance has not been made to covenant nor to his assignee. The dec^r states the assⁿ of course an allegation would be consistent with perform^{ance}, 1 Salk. 139. 3 Wils. 440. 5 Mod. 133

In a cov^t for the pay^{ment} of a sum certain there can be no apportionment of demand & the breach must be for a sum certain. Thus when the freighter of a ship covenants to pay £10 p^r ton. the Plff alleges non pay^{ment} for carrying 10 Tons & 1 cwt. or 10 $\frac{1}{4}$ tons. now the cov^t contains no stipulation to pay for a fraction of a ton and the above allegation is perfectly consistent with the fact that Def^t has paid for every ton. There can be no recovery without obliging him to pay for the freight of a fraction of a ton. But if the cov^t had been to pay after the rate of so much p^r ton the allegation would have been good as the cov^t would have covered the fraction. 2 Ld. 124. Attk 19. Esp. Dig. 303.

This assⁿ of a breach would be ill on demurrer, yet if Def^t pleads to issue instead of demurring dondict for Plff. if he would enter a remittitur or remit the resp^{ndent} a fraction he might in this particular instance take judg^{ment} for the issue as the amount or rate & quantity appears in the dec^r. Salk. 658. 1 Root. 66. Esp. Dig. 303.

I yesterday explained to you the genl. rules in relation to the pleadings on the part of the P. of something remains to be said as to the pleadings on the part of Def^t.

The most usual plea to an action of cov^t. broken is that of performance. It has been customary in Eng. but unusual in the Am^g practice for Def^t. to plead that he has not broken his cov^t. & this is introduced as a plea of performance or what is equivalent to it that he has kept his cov^t.

I think however that such a plea cannot be good in any case whatever for it refers to the very very point of law which may be involved in the question of performance. And if it were competent for Def^t. thus to plead, Plff. might reply that the Def^t. has broken it & thus no direct issue would be formed. It appears to me to be an irregular & inadmissible mode of pleading performance 2 Vent. 156. 2 Mod. 33. 3 W. 1312.

The particular facts on which Def^t. relies should appear if there are any - if none there can be no performance. It seems to have been made a question by ancient counsel in Eng. If by way of concluding his apt. of breach Plff. says "So Def^t. has broken his cov^t." & Def^t. pleads that he has not broken his cov^t. it is said that it is a good plea because it is a direct negation of the al^leg^d. & forms a complete issue. 8 T. Rep. 278. 281. That this pleading is certainly bad as the averment is not issuable it brings a mere conclusion from the al^leg^d. facts al^leg^d. 2 B. & C. 1312.

It is laid down as a rule that when the court^{ts} in a deed
are in the affirmative it is competent for Deft to
plead performance genl^l i.e. when the court^{ts} are pos-
itive stipulations to do an act or acts. and not
negative as to abstain from doing them. 1 Inst 303b.
Exp. Dig. 305. & Bac. 91.

This rule however must relate
to cases in which the things covenanted to be done
are in some measure indefinite or multifarious
as a court by a Shff to return all writs. or by a D. Shff
to discharge all the duties of his office. the plain-
tiff in such cases should be that as Shff. he has returned all
writs or as D. Shff that he has discharged all the duties
of his office. but such genl^l pleading is only allowed
since allowed in such cases only. Cowp 575. & Bac. 91.

But on the other hand, Deft^d has covenanted affirmatively
to do certain specific acts. if he pleads performance
he must do it by alleging specially performance of
each specific act. As if I had cov^d to enfeoff A^d
of all the lands of which I was seized on that day.
If I. D. sues on that cov^d it is not suff^t for me to say
that I have enfeoffed him of all the lands I possessed
or was seized of at that time. nor that I have kept
my cov^d but I must plead that I have enfeoffed
him of such such lands & then aver that they
are all of wh^{ch} I was then seized.

So an Ex^{or} sues
on his bond or cov^d annual, that he has kept
his cov^d nor that he has paid all the legacies, but

that he has paid such a legacy to B. such an other to C
be other even that these are all that the will con-
tains. Cro. Elj. 749. 1 Samsd 117. note. 1 T. Rep. 752. Cro-
Jac. 359. 360. 1 Lev. 303. Salk 498. 1 Sid. 215.

The genl.
rule then really is that when covt. an affirmative
performance must be plead specially & the other
rule first laid down that Def. may plead perform-
ance genl. is but an exception to it. genl. pleading
being allowed for the purpose of avoiding prolixity
or in the words of Sir. G. Coke of "avoiding infiniteness"
and unnecessarily burdening the record.

Thus it is
obvious that, after a Dep. Shff has served for years
it would be requiring of him a moral impossibil-
ity to say that he shall allege specially all the
official acts which he has done in the perform-
ance of his duty.

And then are other cases which
are similar. Thus when a brewer covt. to deliver all the
grain thrown out of his brewery. he was allowed
to plead genl. from necessity in such cases that kind of
pleading is allowed. Corp. 575. 1 T. Rep. 753. Cro. Elj.
749. 916. 1 B & P. 643. Esp. Dig. 305.

And a plea of per-
formance whether genl. or special; otherwise than in
the words of the covt. i.e. not corresponding with the
words of a covt. is ill on genl. Demr. The reason of this
rule is that if the plea does not conform to this rule
it of course discloses no sufft. defence. 1 B & P. 455.

Thus suppose an actor brought to Ex^r in a court to pay
all the legacies in a will. He pleads that he has
paid such a legacy to B such a one to C & so on. with-
out more it would be ill. for altho in fact there
may be all the legacies given yet it does not so appear
he should aver that those specified were all the will
contained. which would be enclosing in the words
of the court.

I have thus far spoken of affirmative
covenants. When on the other hand. some of the
corts in a deed are negative. Def^t cannot plead per-
formance specially as to them. No how all are neg-
ative he cannot plead performance specially as
to any of them. But when some are affirmative
some negative. he must plead as to the negative corts
that he has not done the acts covenanted against
As to the affirmative he must plead according to
the rules above laid down. for there is a solecism
in saying that one has performed a negative court
performance presupposing an act.

If however Def^t
should plead that he has performed it doubtless
means that he has kept his covenant. and as the
plea is affirmative only in form. not in substance
advantage can be taken of it only by special
denial. Cro. Eliz. 203. 691. 1 Inst 303. 6. Cowb 576.
Com Dig. Pl. C. 25-6. Esq. Dig. 305.

If however when some
corts in a deed are negative & some affirmative & the
negative ones are void. Def^t may plead as if they did not

exist i.e. without noticing them merely pleas performance properly as to the affirmative ones. As if a Def^t pleads among other stipulations not to execute a particular kind of process by the rules laid down in Hoffs & Gadsden you will recollect such a cov^t is illegal & void as it is a cov^t not to do ones duty. 1 Saund. 83. 117 note 5. More 856. N^o. 13.

When one cov^t is in the disjunctive Def^t must show in his plea which of the two things he has performed, as if he had covenanted to convey & certain tracts of lands or to pay a certain sum of money in much alleg^r in his plea whether of the two he has performed. 1 Inst 303. b. Co. Lac. 659. 8 Co 133. 1 Saund 117.

And it is said that if the plea performs without this specific allegation the plea is ill in great defect and so the rule is established Co. Elg. 233. Com Dig. Pl. C. 25. l. 1. 1 Lw. 361.

This rule does not appear to me correct on principle. For the defect is not in the substance of the plea, if either is performed the cov^t is performed the plea then should be ill only on special demurrer. & so says Bacon who however is not of the best authority. 4 Bac. 91.

When one cov^t to do an act which consists of what is termed matter of law as to make a conveyance or execute a discharge. Def^t must plead *quo modo* i.e. not only that he has made or executed the conveyance or discharge but also in what manner, that the court may know whether it is suff^t in law. For the construction of such cov^t.

a conveyance or discharge is understood to mean all legal
localist conveyance &c. Whether it is so should appear of
record. Dyer 229. J 60 25. Hob. 67. 107.

On the same principle
if one covenants to do an act, which must appear of record
as to levy a fine or suffer a common recovery, he must
allege performance *Actu quo modo*. For this is matter
of Law. See Sac. 560. Co. Lit. 303. 6.

There are some rules of pleading which apply exclusively to bonds or coven. of indemnity on the part of Def.^s

On such art: or bones
the Def^t may sometimes plead non damnification by
way of insimulatio - that is that P^roff has not been dam-
nified. In other cases this mode of pleading to court
is not correct. For Def^t must plead not only that the
P^roff has not been damnified but also the quo modo in
which he has prevented it. On this subject the first

Genl rule is, if the covt is to discharge or acquit the cov-
enant from any particular thing ascertained in the
instrument or and is of a debt or bond or duty &c. non dam-
is not a good plea. he must plead that he has acquitted or
discharged the Pff according to the terms of the covt
and allege the gen moco or by payt, tender &c. Leath 374.
2 Co. L. a. lio. 86. 433 & Bac. 92. 1 Samsd 117. a. 1 BPP. 63.

The reason is that as the Sup^{ts} has covenanted to do a certain service not in his own preference specially according to the rules already given & if thing come consisting of matter of

Law 1. must plead ~~to~~ ^{as} ~~in~~ ⁱⁿ ~~the~~ ^{the} ~~case~~ ^{case}. but when the cost
is given to save harmless, or to indemnify the Plff of
such a debt or obligation or duty, non dam. is a good plea,
because no special act is covenanted to be done. Def. merely
costs to bring about a certain result, merely to save the Plff
harmless, the measure is not stipulated it may be done in
various ways: by cancelling the obⁿ or deed, pay^g discharge
See 1 Lamm. 117. note. Geo. Jac. 363. 4. 2 Co. 4. 1 ^{Lev.} 194
2 Will. 126. 5 T. Rep. 309. 10.

But whether the cost is given
to save harmless or acquit, or particular as to discharge
or acquit covenant of any thing not ascertained in
the instrument, not specific, as of the damages costs & charges
that may accrue in such a suit non damnificatus is a
good plea. The distinction depends on the circumstances
of the thing not being ascertained in the instrument
See. Eliz. 916. Barth. 374. 3 Mod. 252. 1 B & P. 639. note
5 Elrod. 224

The reason why non dam. is a good plea in both
those cases is that as the damages costs & charges from
which the covenant is to be discharged are not ascer-
tained in the instrument, it is in both cases virtually acquit
costs to save harmless or of indemnity, because we cannot
that any damages costs or charges have now accrued
in such a suit. Now here note a plain diversity between
this & the former case of a cost to acquit or discharge of
a bond or debt ascertained in the deed, in which it is
clear that I come to acquit you of a certain existing claim
but I cost to acquit you of all damages that may
accrue, it does not appear that any damages have ac-

and then can be no acquittance of that which has
no existence. I cannot therefore plead *proformam ex quo*
made or specially, altho I have perfectly fulfilled my
cove^t. I should be entrapped by the rules of pleading
if they required it. A non damif^s is therefore a good
plea for it is in effect saying no more than that
the Plff has not been damnified by that which
I engaged should not injure him, and then
if any damage has in fact accrued it may be
alleged in the replication. 1 Sarrnd. 117. note 1. benth.
375. Cro. Jac. 363. 4. 2 Co. 4. 2 Wils. 126

When non
damif^s is a good plea if Def^t will plead affirmati-
tively as that he has acquitted & discharged Plff he
must do it specially, i.e. point out the act by which
he has done it. because his affirmation allega-
tion implies that he has done some specific act
he must then show what it is. So that it will
not do to plead that he has saved Plff harmless
without more, tho it would do to say *scilicet* viz. that
Plff has not been damnified. 2 Co. 3. 4. Cro. Jac.
363. 634. Cro. Eliz. 916.

If however Def^t plead in the
affirmation generally, that he has saved Plff harm-
less without showing how, the plea is ill only on
special dem^r for it is defective in form only, not
in substance. 1 Lev. 194. 1 Sarrnd. 117. note.

A non
damif^s is not a good plea to an action on a bond
or cove^t for the pay^r of money at a day certain

attach it appears in the instrument by way of recital
or in the condition of a bond to have been given
as a genl. indemnity. For the obligation to be per-
formed is by a specific act. 1 Bos & Pul. 638.

If Def^t pleads non damnif^d when that plea is proper, a
replication consisting of a genl. traverse or a genl. allega-
tion that Def^t has been damnified is ill. For in such
case it is necessary for Def^t to show a special breach & in
what it consists, as that he has paid the money been taken
in Ev^t otherwise his repⁿ is ill. 1 Lev. 83. 1 Sid. 444. 4 Wms.
92.

Of joint & joint & several covenants.

If any
number of persons cov^t jointly & only jointly, they must
all be joined as Def^t in an actⁿ in the court. If two per-
sons cov^t jointly & severally they may be joined as Def^t
in the same suit or may be sued separately, because
they cov^t severally as well as jointly & may be sued
in diff^t actions at the same time.

But if three or more
persons cov^t jointly & severally, they may be all sued joint-
ly or each severally, but two of them cannot be joined
without joining all the rest, because the court must be
treated as altogether joint or altogether several, and if
two are sued without the third, the court is treated as if
as to them & not as to the third. This is the genl.
rule of distinction applying to all joint & joint & several
contracts whatsoever whether cov^t or obligations, is unless
1c. 26. 1 Lev. 338. 2 Vern. 99. 3 Salk. 363. 3 Bac. 697. 3 T.R. 782

If there are two or more joint covenantes obliges, all must join in Diffs in an actⁿ on the instrument for if each could bring a separate action covenantes would necessarily be subject to as many actions, as there are covenantes. 2 T. Rep. 282.

And if in such case one of two or more covenantes sees alone D^{ft} may also plead the nonjoinder in abatement or upon oyer & recital. 2 Stra 1146. 5 Co. 18.6

If one of two j^t covenantes dies, his Ex^{or} or personal r^{pt} can neither see alone nor join with the survivor in an actⁿ upon the cov^t. the entire right of recovery survives to the survivor. he is liable however to account with the r^{pt}. for the assets. & this rule is common to all actions on contracts. Cro. Eliz. 729. 1 East. 497. 1 B. & P. 445.

In some cases where one covenantes with two or more jointly & severally, one may see alone & in others all must join. On this subject the rule is that if the interest of the covenantes appears to be several they may see separately but if the interest is joint they must see jointly. Thus if A & B are by one d^{de} same and have blk^d over to C & White over to B. & cov^t with both each of them as to the whole that A has good title. each may see alone. because the interest appears distinct & several. it is not a bar of an entire title to C & B and if A should prove to have had no title to blk^d over it is no injury to B. 5 Co. 8. 18.17 2 Leon. 47. 3 ib. 160. Bull. N. D. 157.

So also on a cove^t to pay A & B. \$100 to be equally divided between them each may maintain a separate action. i.e. each may sue for his \$50. And each may declare upon the cove^t as having been made to himself without naming the other for in legal effect it is a distinct cove^t to each for \$50. For altho both cove^ts are in the same deed yet the subsequent words make them several. Altho they may be so declared in or each may declare on the cove^t as it is to cover this proposition. As 8 Cy. 729. Str. 76. 819. Com. 832.

But altho the cove^ts are both in one deed & supposed to be several as well as joint, still if the interest of the coven^t appears to be joint they must all join in the action. as if A cove^t with A & B to pay to them or to each or either of them \$100 without the words "to be equally divided between them". A & B must sue jointly. for they take jointly in judgment of law. So then if one binds himself to two cove^ts jointly & severally in one deed, if their interest appears in the instrument to be joint they must sue jointly notwithstanding the introduction of the word of severally. You observe the rule is diff^r as it relates to Coven^ts & coven^tors. 5 Co. 18. 19. 1 Inst. 262. 1 Bac. 532 1 East. 497.

From the rules already laid down it follows as a corollary that the coobligors & cove^tors may bind themselves severally & be so sued. For the same thing, yet coobligors or cove^tors cannot have sev^l rights of action for the same thing. For altho two persons may be sued in diff^r actions for the same thing, yet the policy of

of the law will not suffer, as it ought not, and person
to be sued twice for the same thing. 5 Co. 19. a.

If two or
more persons covenant jointly & severally each may be
sued alone for the default or neglect of the other,
altho the one sued has not been in fault, because
each is in the nature of a surety for the other. Thus if
two Ex^{rs} bind themselves jointly & severally to pay all the
legacies given in a will if it should require all the
assets they nothing. B the other Ex^r may be subjected
on the bond. So if it should en^d that W^{ill} should
do a certain act. he may be subjected by W^{ill}'s default.
Gtra. 553.

And in this case where one of two persons jointly
& severally bound is sued & judgment recovered ag^t him, it
is no bar to an action ag^t the other, for both continue
liable until the debt is performed or pay^{mt} made &
even tho his body is taken an Ex^r & committed, for each
is responsible at all times that pay^{mt} shall be made &
all proceedings not terminating in pay^{mt} or satis-
faction are no bar to future process. 6 Co 46. Cro.
Jac. 73. 4. 3 East. 251. 5 Co. 86. Chit. Nells. 124. 182.

I have already observed that if one of two j^t obligors
or cov^{ers} dies the Ex^r or up^t of the decedent cannot
bring an action nor join with the survivor. So too
if one of two j^t obligors or cov^{ers} dies the other sur-
viving the liability survives ag^t the survivor, tho up^t
of the decedent is not at all liable for as before he had
no right so now he has no liability. but if he is sued

I am compelled to pay the whole. he may oblige the rst to contribute.

On the other hand if the cov^t be joint & several as to those bound by it & one dies, the other surviving the rst of the deceased are liable at law, not jointly but as upon a sev^t cov^t or contract. because when sev^t it is precisely in the character of two separate contracts. 1 East 404.

If two persons cov^t "jointly or severally" the word "or" in repetition is construed as "and". If construed literally it would be at the option of the cov^t & they could defeat any form of action. Sta. 76 Comp. 832. Hise. Bills. 185. b.

If one of two joint & sev^t cov^t be made Ex^{or} to the covenant, the obligation is at law released in toto as to both. For one of the debtors by virtue of his rst character becomes creditor also. he cannot see himself & the law will not allow him to see his coparty. 8 Co. 136. Salt 300. 1 Inst. 164. b. 3 Bac. 679.

That cov^t is discharged when at law & no action can be maintained on it. In this case however a court of Eq^y will compel pay^t or performance in favour of creditors & legatees of covenantees, but not in favour of his own rst or volunteers claiming under the state of distributions. but this pay^t is compelled only when the debts & legacies cannot be paid without it. Dalb. 240. Yelo. 160. Cro Car. 373 2 Pow. ben. 254. 5. 9 Mod. 62.

The reason why Eq^y will

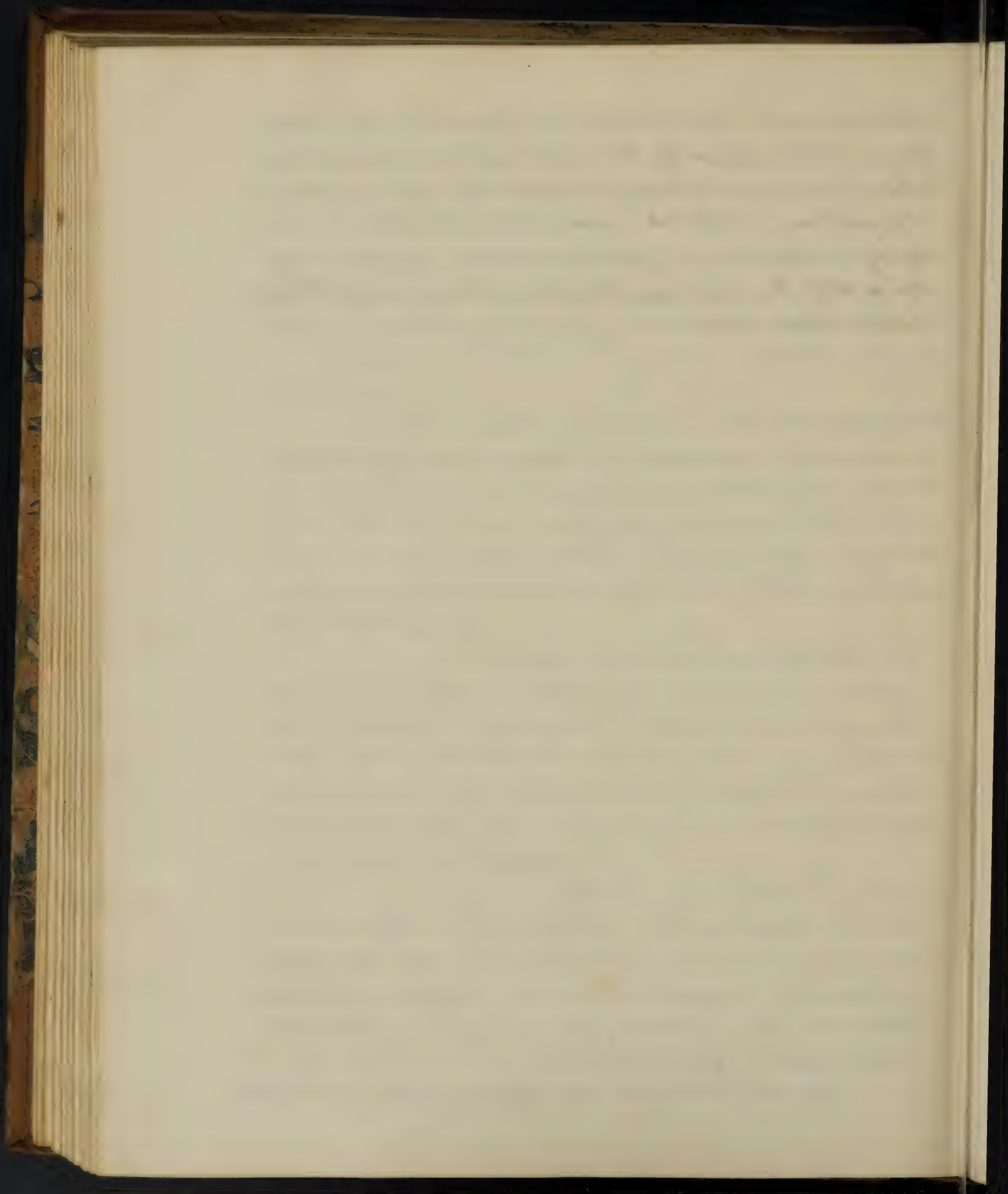
inforce pay^{nt} in favour of creditors is obvious, a man must
be just before he is generous. The appointment of a debtor
Ex^{or} is in legal effects making him a legatee to the
amount of the debt being a sort of negative gift,
but as it is an implied legacy it is postponed to those
that are express. but a legacy express or implied is to be
preferred to those claiming under the stat. of distrib^{ut}
this is the reason why the cov^{ts} is not enforced in favour
of heirs &c.

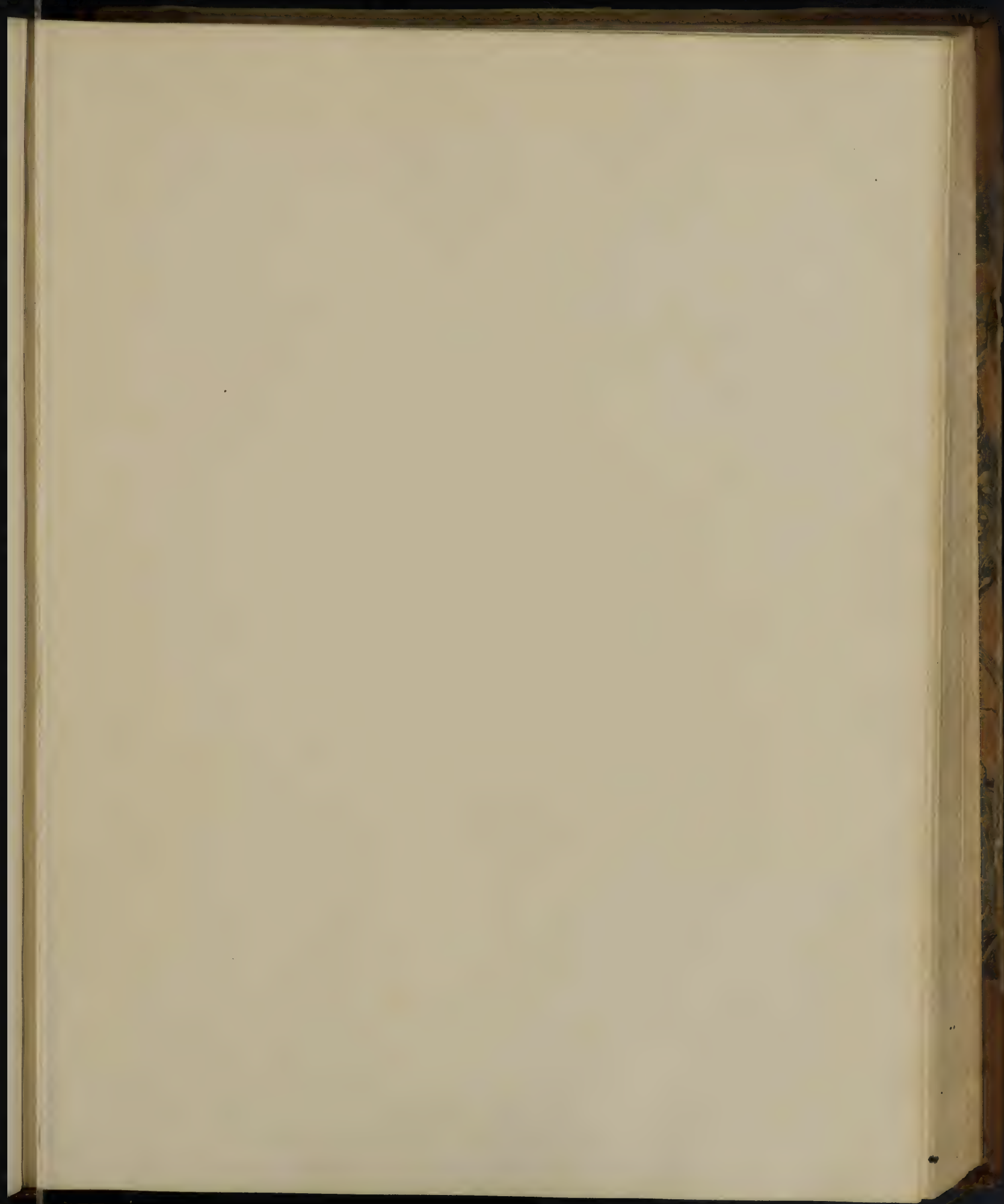
If an instrument begins with "We A & B c^o &c"
and is signed or executed by A alone. he may be sued
alone upon it. because in legal effects it is his sole deed
and altho there is an incongruity between the operative
words & the signature. the execution is suff^{ic} as arg^ued
indeed he usually uses the royal stile "that's all" / Burr.
323. 2 T. Rep. 32.

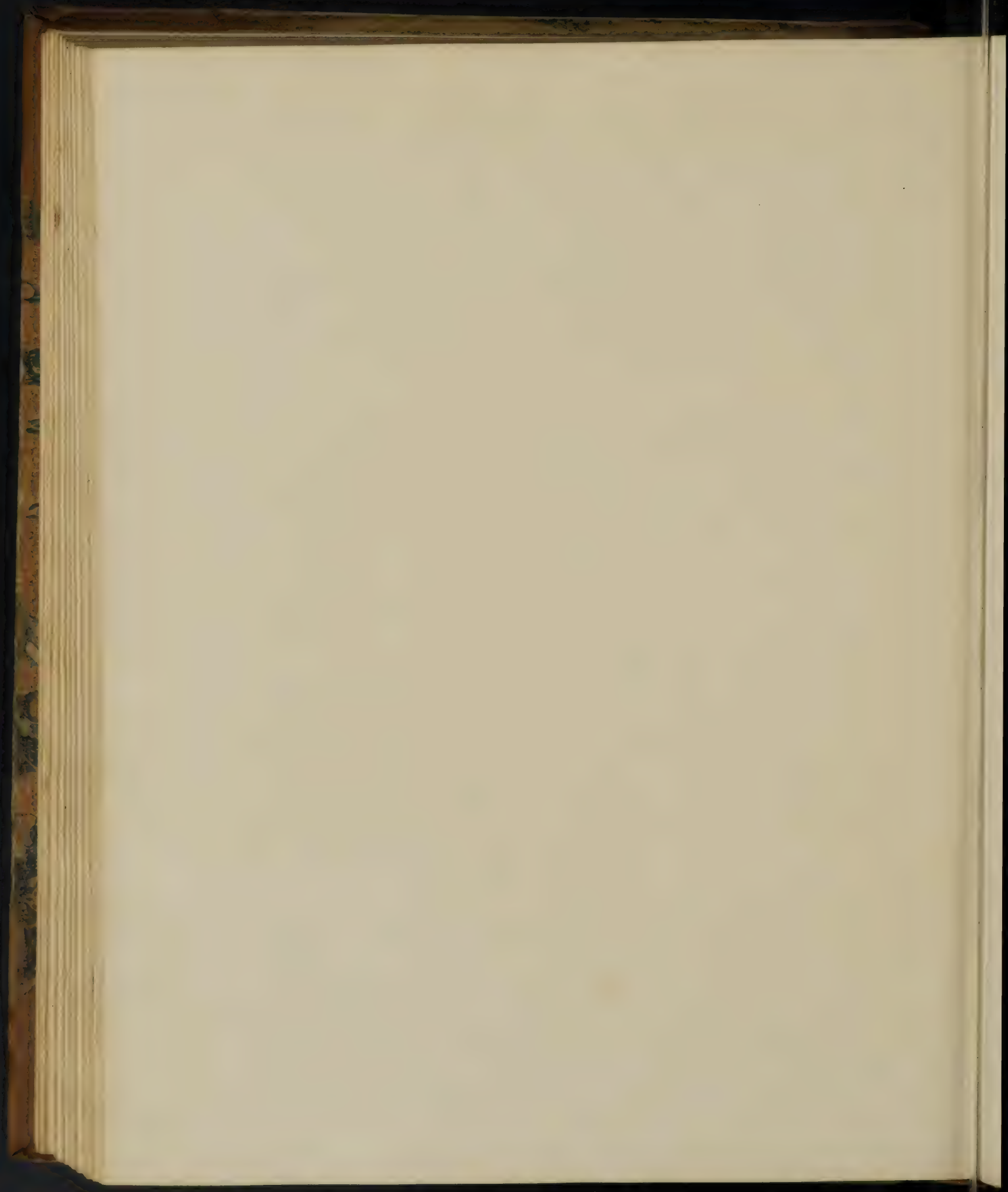
So if an instrument recites that A B
& C cov^{ts} on the one part & C does not recite it.
A & B may be sued upon it alone, averring that
C did not recite. I see no use of the averment, the
fact sufficiently appears, it is however usually in-
serted out of abundant caution. 2 Sha. 1146
/ Burr. 323. 2 T. Rep. 47

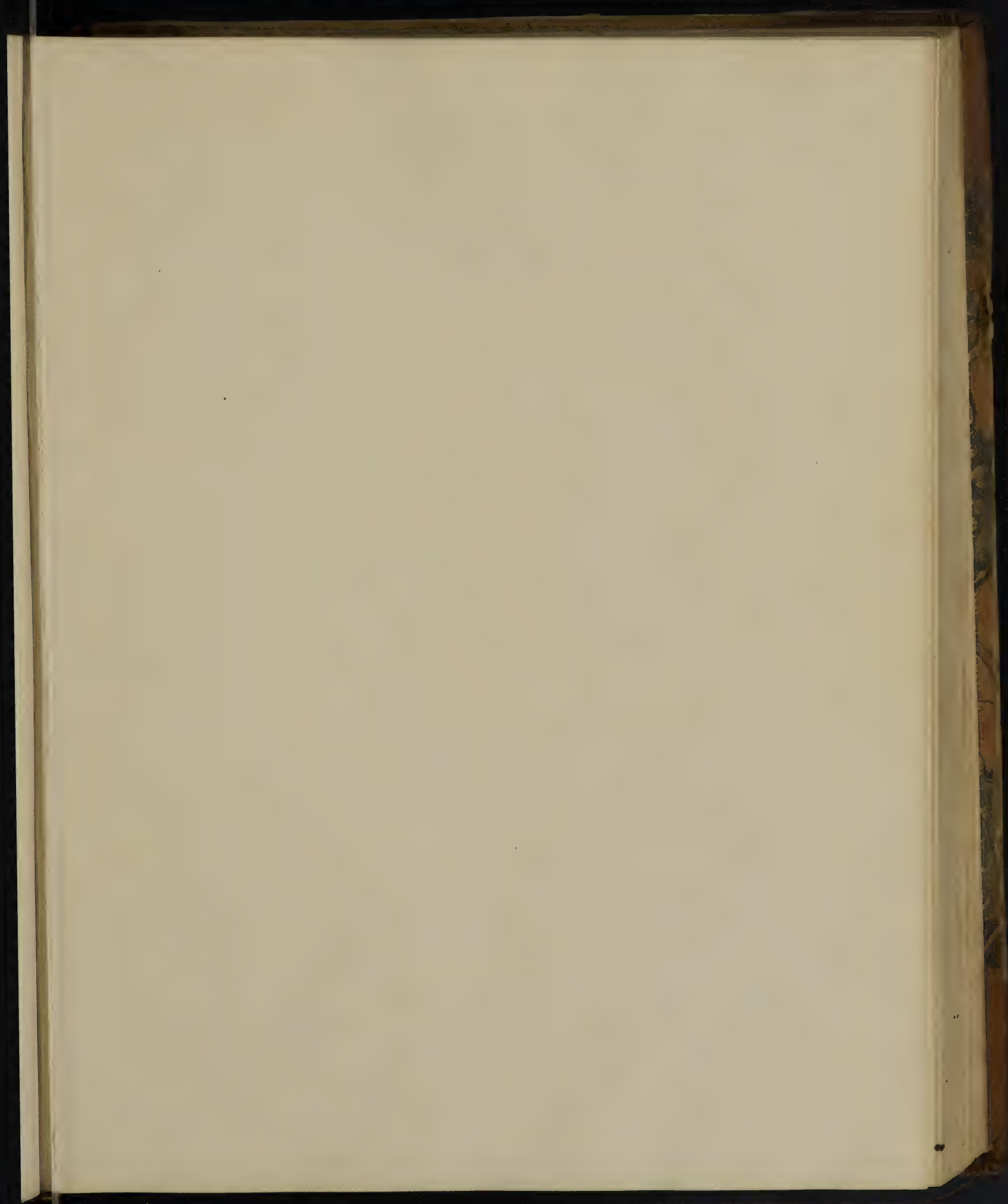
If two or more bind themselves
in one obligⁿ or by one promise the contract is of course
joint the the word jointly is not used, unless the
word "severally" or some equivalent word is used, or
words which imply severally of obliⁿ. Thus we A & B
promise to pay 6. \$100 within "jointly" or "severally"
the inst. 2 Atk 31. 12 May 1203. 1 Ann 76. 236. 3 Ba 677

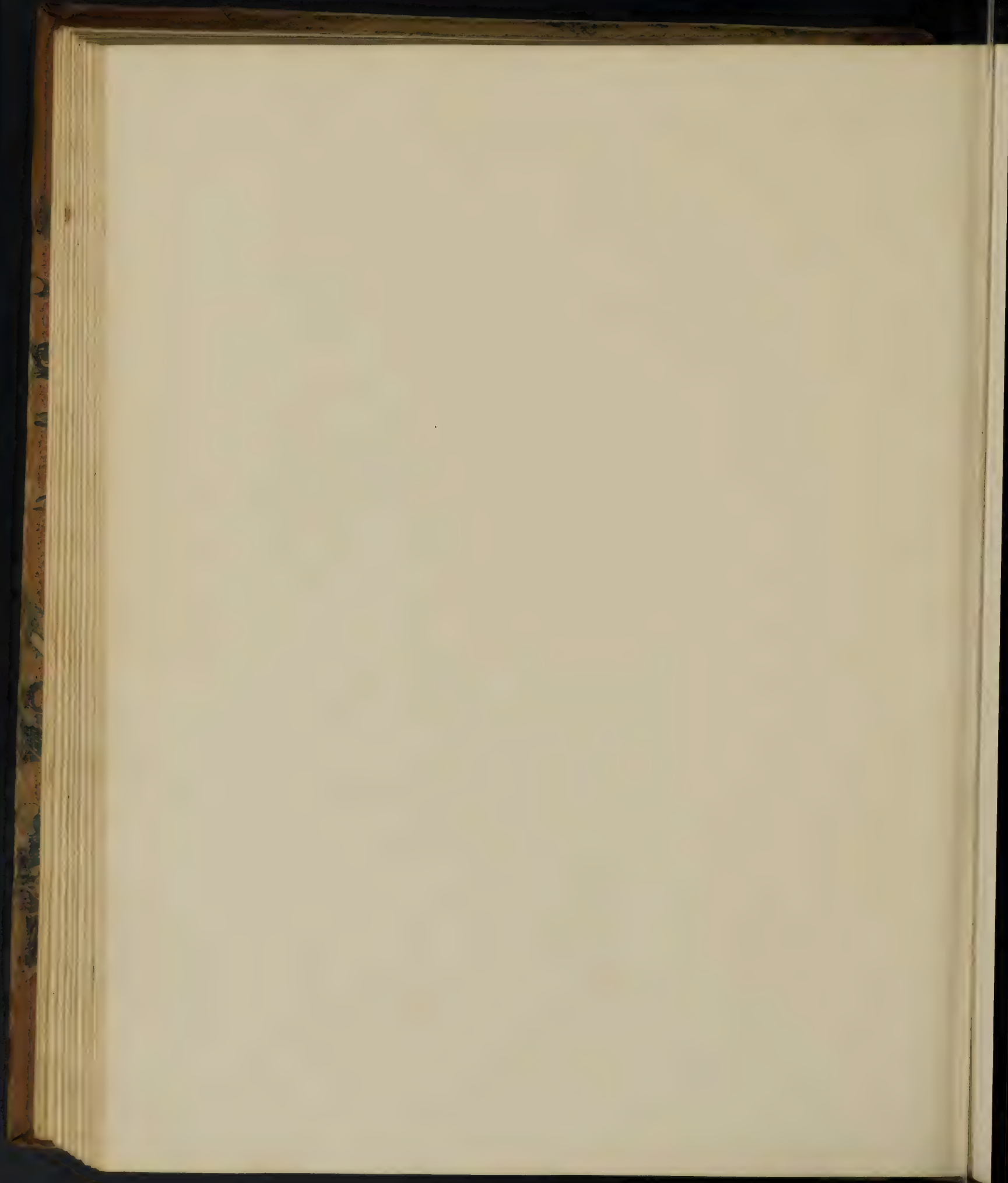
But if a contract or other instrument begin thus. I severally
promise & is signed by two, it is sev^l as well as joint,
whereas if it began with "We" without words of severally, it
was joint only. When it is used, it must be taken distribu-
tively, indeed it is impossible to consider it joint merely.
Comp. 832. Peake's ba. 130. Ch. Bl. 175. Stra. 76. 809. La Ray.
1544. 5 Burr. 2611.

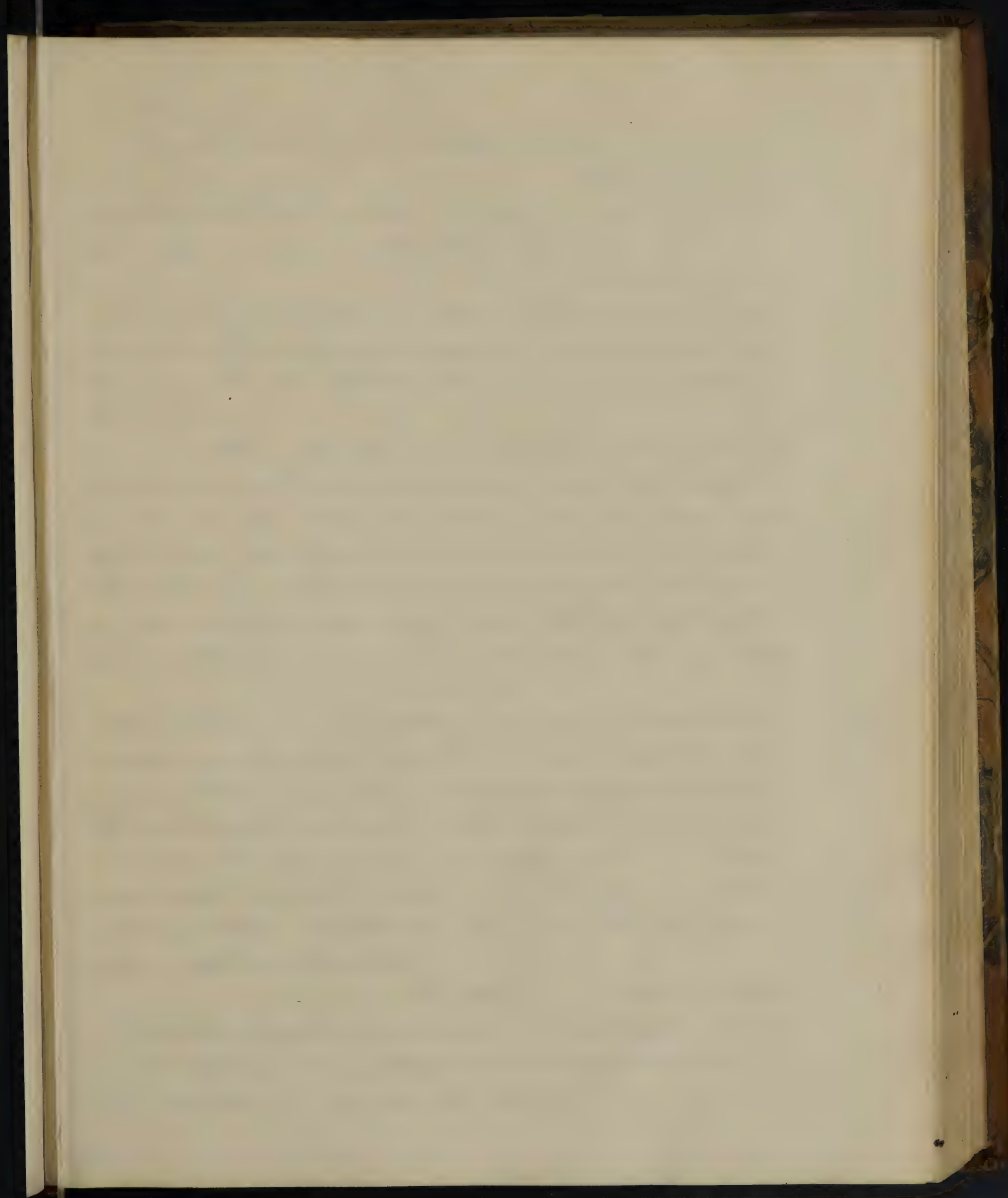


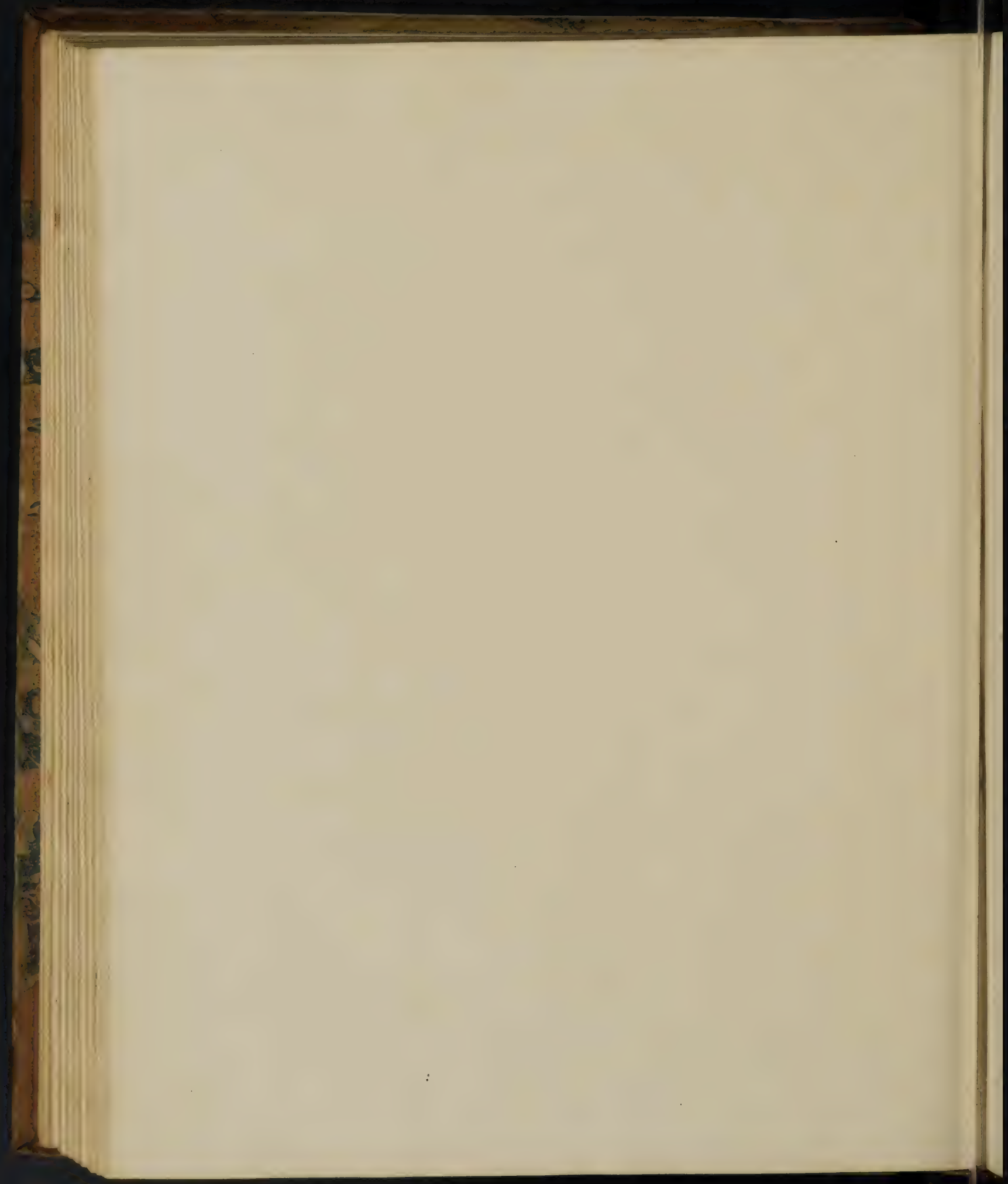












Action of Account.

When there are
counts of Ch^t this action is in gen^l out of use: in
con. however it is still often bro^t

The action of acc^t
is founded on express or implied contract that one who
has rec^d the property of another to acc^t for will render
his acc^t for it. If he does not render it this ac-
tion lies.

It lies at C. L. only ag^t Guardⁿ in So cage. Bailiffs
& Receiv^{rs} & they bring actions for each other between
j^r merchants. Mats. 48. 1 Bac. 16. Co. Lit. 172. 90^b 2 Roll
Ab^t 117. 61. Mats 227. 8. 1 Law et P. ab^t 1. 2. 1 Com. & acc^t as.
By st. 4 clare. the acc^t is retin^d in favour of one
j^r but. & but in com^m ag^t each other as B^lff before
this st. the action lay not in these cases. 1 Bac. 17. 1 Inst. 172a.

at C. L. the acc^t lay between the orig^l parties only
not for a ag^t their repre^s being founded on such
privity that one party was supposed conversant of
the others disbursements. 1 Com. acc^t 13. 1 Inst. 89. 90
2 ib. 404. F. N. B. 117. 1 Bac. 17. 1 Com. 88. There is
an excepⁿ at C. L. in favour of B^lff of j^r merch^{ts}
not ag^t them. Co. Lit. 90^b com. acc^t 13. 2 Inst 404 &
this by the law merch^{ts}

At West. 2 i. e. 13 Ed. 1 & 25 Ed.
3^d & 31 Ed. 3 (which are antient statutes) extended the ac-
tion to Ex^{rs} in case of B^lffs. Guardⁿ & Receiv^{rs} the Ex^{rs} of
Ex^{rs} & to adm^{rs} 1 Bac. 17. Co. Lit 89. b

4. & when returned it agt^r ad^r of Guard^m Blff. rec^d.
ac. so also agt^r the Ex^r or ad^r of j^t t^r & t^r in bond
as well as to the j^t tenants &c themselves. 1 Bac. 17. 3 Bl. 164.
So that it now lies j^t for & agt^r the p^r up^r of the
origⁿ parties.

The action is returned by stat. 6 j^t tenants
ten^t in bond. Copars^r then Ex^r & ad^r agt^r their
colleat^r then ad^r &c. also in favour of Ex^r who are
resid^t ligat^r agt^r their Co. Ex^r to resid^t Ligat^r in
j^t agt^r Ex^r. Does it lie in bond agt^r Ex^r &c
of Blffs & Rec^d? it does by usage. as for the Ex^r of them
where Blffs &c have not accounted 1 Roll. 116.

In every case
except of guard^m Blff^r is charged in Diet^r as Blff or Rec^d.
or both. Com. Acct. E. 2. a. b. F. N. B. 116. Distinction
between Blff & Rec^d — Blff is one agent or serv^t who
has received the property (of any kind) of another to im-
prove for the owner & account he who is entitled to
an allowance or wages for his reasonable expenses
& charges. 1 Inst. 172. a. Blff must account for prof-
its which he has made & for those he might have made
by reasonable industry. Co. Lit. 172. a. Com. Dig. acct. a. 3
1 1/2 ac. 19. 1 Selw. 2. n.

& Rec^d is one who has received
money for the use of another to make an acc^t he who has
no allowance for his trouble 1 Inst. 172. a. 1 Roll. 119. Com
Dig. Acct^r a. 4. That acc^t lies against one who is appointed
to receive the rents or debts of another post^r & receive money
due on bond to B.

Just a rec^d has no allowance for his

not bound to acctⁿ for profits. - Ex^h as between y^h Murch^h & y^h
has allowance & acctⁿ for profits. Co. Lit. 172. a. 1 Bac 19. 21.
1 Com. 93. 1 Com Dig. acctⁿ E. 103. Therefore Bluff
cannot be charged as Acctⁿ if he were he would lose
his allowance Co. Lit. 172. a. 1 Roll. ab. 119. 1 Bac. 19.

This acctⁿ being founded on privity lies not in case of tort.
1 Com. acctⁿ & 1 except in favour of the King in Eng.
1 Inst. 172. a. 90. b. 1 Co. 89. a. do of Infants. 1 Kerr. 436. 2 ib. 295
342. 1 alt. 489. 1 Com Act. a. 2. Felt B. 118. Co. bkt 229. Co. 2. 89.

If there are three or more partners in trade each does not lie
at law to adjust their acct^s the remedy must be in
Eq^y to prevent multiplicity of suits. Boardman & Lygon
L. 6th Feb. 1808. 2 Bos & Pul. 269. 2 Day 492.

In declining agt^s

Bluff or acctⁿ Bluff states that he delivered vessel property to y^h
as Bluff. & that Bluff refused to render his reasonable acctⁿ
which he claims together with his damages & costs. In case
of Partnership I suppose of J^h Trust^h de Bluff states that
Bluff has no more than his part to.

It is said that acctⁿ

lies not for a sum certain. as if one delivers \$100. to a s. to
trade with the former shall not have acctⁿ for \$100. but
for the profits. (But in Eq^y all would be settled at once.)

Should not the rule be that for a sum certain one should
not be charged - 1 Bl. 14. 1 Com acctⁿ a. 3. ante For acctⁿ lies

agt^s a Bluff for a sum certain s. d. on Ex^h (Hot. 206) do for
money rec^d by a on bond for 143. - So when one receives
money for the use of another to render an acctⁿ an acctⁿ

of acct will lie it seems for the money rec^d to. Co. Lit. 172^a
1 Bac. 201. 2 Mod. 101. 1 Com. acct. a. 4. Pet. 73. 116. 1 Roll. 14. 22. 116.

So if money is delivered to be returned on a certain writ
1 Com. acct. a. 4. Pet. 73. 116. 8. 1 Roll. 116. 10. 42. 22. Decided by
Ch. B. that acct. will lie for a sum certain. Hist. 163
If money has been rec^d by B to the use of A acct. lies by A
then Plff must declare of whom the money was rec^d.
1 Inst. 172^a 1 Roll. 120. Pet. 73. 118. 1 Com. acct. a. 4. Still
if I deliver money to A to deliver to B for my use & A
delivers it, I cannot have acct. agt. B. For he is not, having
to the use. 1 Com. acct. D. 1 Roll. 118. 5

If Bailor of goods waste
or refuse to deliver them acct. will not lie but trover or
detinue. 1 Com. acct. D. 1 Bac. 19. 1 Roll. ab. 116. for he has
not rec^d. them to improve or acct. for. So it lies not
agt. dispossor for the profits (as of King & infant waste)
see ante) but trespass which is here in the nature of acct.
1 Com. Dig. acct. D. 3 Lion. 24

If A Plff makes a dep^t. a cant.
draw the acct. agt. the dep^t. for want of privity - but the
Plff may. 1 Com. acct. D. 1 Roll. 118. 20. Pet. 73. 119.

The Inf^t
may be Ex^t. liable for torts yet if made Plff he is not
liable to acct. For he cannot contract & is supposed in-
capable of accounting. 1 Com. Dig. 1 Bac. 17. 1 Roll. 117.
Pet. 73. 118. Co. Lit. 172^a

If he who receives property of another
to acct. makes an express promise to acct. this acct. on a spec^l.
agt. on the promise will lie. 1 Bac. 21. 1 Lib. 9. Carth. 89. 1 Hal. 9

Kint 164. 354. Comb. 49. Esp. 96. 7. "Contracts". But in ast
[by P. Hott.] Plff shall not travel into the particulars of the
acc^t. but confine himself to the damages he has sustain-
ed by Def^t's not accounting. Esp. 97. Lat. 9. Smith. 89. Comb
49. (2w. 1 Bac. 29.) Bull N. P. 148

If one by deed acknowledge
that he has rec^d money to acc^t. Plff has his election to bring
an^d. & actⁿ on the deed. 1 Bac. 19. 1 Roll. 118.

If one finds
the property of another acc^t. he is not ag^t. him for the ast.
founded on privity to Com. & acc^t. 2d.

Mode of proceeding in this action.

In action
of acc^t. if Plff prevails there are two judg^{ts}. - The first is
quod computat - auditors are then appointed before whom
the accounting is had. 1 Wils. 99. 1 Bac. 21. 1 Mod. 42
1 Com. 92. 1 Com. acc^t. 8. 15.

The auditors then make their
award & final judg^t. (quod recipit) is rendered upon it as
upon a verdict (post) 3 Wils. 164. 1 Selw. 7. 9. 11 Co. 40^a. Com.
Dig. acc^t. 8. 15

Before aud^{ts} in Com. the parties are of common
right entitled to testify - They may also by stat^e be required to
testify & on refusal may be imprisoned by aud^{ts} till they
answer. St. Com. 28.

If Def^t refuse to attend before aud^{ts}
or produce his acc^t. the ad^{ts} must award to Plff his whole
demand. (post) Stat 28. In Eng. the 6th do it. Com. Dig. acc^t. 8. 15
As Elj. 806. 3 Wils. 117.

If aud^r find a balance in favour of Def^t in Com. they
may award Judgt^r govt for him to recover damages as well
as costs. 2 Lev. 150. Not so in Eng. receipt in Ch^t. 1 Bac. 16. Semt.

As to what Def^t may plead in bar, there has been much
contradiction 3 Wils. 113. It is competent for Def^t
to plead in bar to the act^r any thing which shows that
he is not bound to acc^t - It is a good plea therefore that
he never was Blff. 1 Com. acc^t 8. 4. 1 Bac. 20. 1 Roll. at
121. This is the gen^l issue. So a release of all actions is
a good plea in bar. 1 Roll. 128. 4 Bac. 85. 1 Bac. 20

So an ac-
count of debt^r that Def^t should be acquitted is a good bar.
Co. Ely. 82. it operates as a release. Plea that Def^t recd.
the money to deliver to S^d & that he delivered it. is said
to be good. (3w) Com Dig. acc^t 2. 5. 1 Roll. 122. 10. 30. 126. 7. Co
Ely. 830. 3 Wils. 114. 5. this shows that he was not liable to
acc^t. These pleas all go to show Def^t is not liable
to acc^t & therefore go in bar to the action.

But plea that Def^t
has made pay^t or satisfaction. or nothing in answer of the mon-
ey is not good in bar. 1 Bac. 20. 1 Roll. 123. 4. For he was
bound to acc^t Def^t this plea will turn his liability is not
released. But such a plea is good before aud^r Dy. 22. 105
4 Bac. 85. 6 Co. 7. it is accounting.

On the plea in bar, Def^t
cannot go into the acc^t but must prove the fact. 1 Root. 425.
But if Def^t shows that he has been once liable to acc^t. no
spe^cal plea in bar of the action is good receipt, fully accounted
for a release or something equivalent to it as an award of

a release or in discharge see 1 Com. 91. 2. 3 Wils. 73. 113. 4. other things must be pleaded before andst

"Fully accounted" release must be specially pleaded. & cannot be given in evidence under the gen^l issue. 3 Wils. 113. 4. 2 Lw. 149. 150.

Before the Andst Parties may plead & join issue in law or fact. the issue is then to be carried back to the court & then tried. 1 Com. 93. 1 Com. acc^t. & E. 11. 3 Wils. 99. 117. Cro. Ely. 84. 806. 1 Bac. 21. This rule as to issues in fact not adopted in Com.

Whatever can be pleaded in bar to the action must be so pleaded doct before Andst Leon. 217. 1 Bac. 21. 1 Com. 93. 3 Wils. 93. 101. 13. Cro. Ely. 82. 116. This is to avoid trouble & charge to the parties. Stil. 411. 3 Wils. 113. Com. Dig. acc^t. E. 11. And nothing can be pleaded before Andst contrary to what has been pleaded in 6th & found. 3 Wils. 114. Nothing which impinges the judge's "quod computat."

Therefore the pleas upon "Btff." release - fully accounted & award in discharge are not good before the Andst Cro. Ely. 82. 3 Wils. 113. 2 Bay. 116. They are contradictory to the judge's quod computat. For they deny Def^t's liability to acc^t.

But it is a good discharge for Def^t (or as it is sometimes expressed, good accounting) before the Andst to show anything which could not be pleaded in bar to the actⁿ, but which discovers that he ought not to be contractually liable. E.g. that the property was lost at sea, cast over board from necessity &c. 1 Roll. 124. 1 Bac. 21.

3. Lit. 89. So that the goods were taken by robbers without
his fault or by the enemy. 1 Com. 91. Sta. 680. Com. D. act. E. 11 & 12
4 Co. 84a. Auth. sup. 2^d. It is not the plea that the
goods were taken by the enemy in Sta. 680. a plea in
bar to the action? 1 Com. 91.

That the property was perishable
i.e. in danger &c. & that he therefore sold it on credit, is not
good accounting - for he had no right even in this case to
sell on credit without a special commission to that ef-
fect. 1 Bac. 21. 2 Mod. 100

Def^t in accounting is allowed
all losses occasioned by inevitable accident: Enemies
Robbery &c. without his fault. Com. Dig. act. E. 12. 1 Inst. 89^a

Def^t is allowed his reasonable expenses. Com. Dig. act. E. 12. 60 Lit.
89^a Secus of Def^t in his own wrong: as Disfeisor of Def^t.
1 Leon. 129. Com. act. E. 13. ante. to a receiver. 1 Inst. 172^a

When the award is returned to the court final judgment
is rendered for the sum awarded & in Com. the fees of
the aud^rs are a part of the bill of costs - but are to be
paid at the time of rendering the award, by the success-
ful party. St. Com. 37. 2 Lev. 150. ante

Instructions are not appoint-
ed in Com. in actions before single ministers of the law,
he takes the act himself. It does not authorize him to
appoint auditors. Auth. supra.

In actions of book debt for
more than \$17 the C^t in Com. may appoint aud^rs &
proceed as in actions of acct. St. Com. 37. & a special pro-

judgt. given in G. b. on the award of Aud^{rs} in Comm. St. 37

In Eng the actⁿ of auctⁿ is not in much use. The common remedy is in b. l. For in b. l. of law in Eng. Plff is not entitled to discovery of books, papers &c. - nor to Def^{'s} oath. 1 Bac 16. 3 Bl. 437. 381. 2. 449. Wats. 228.

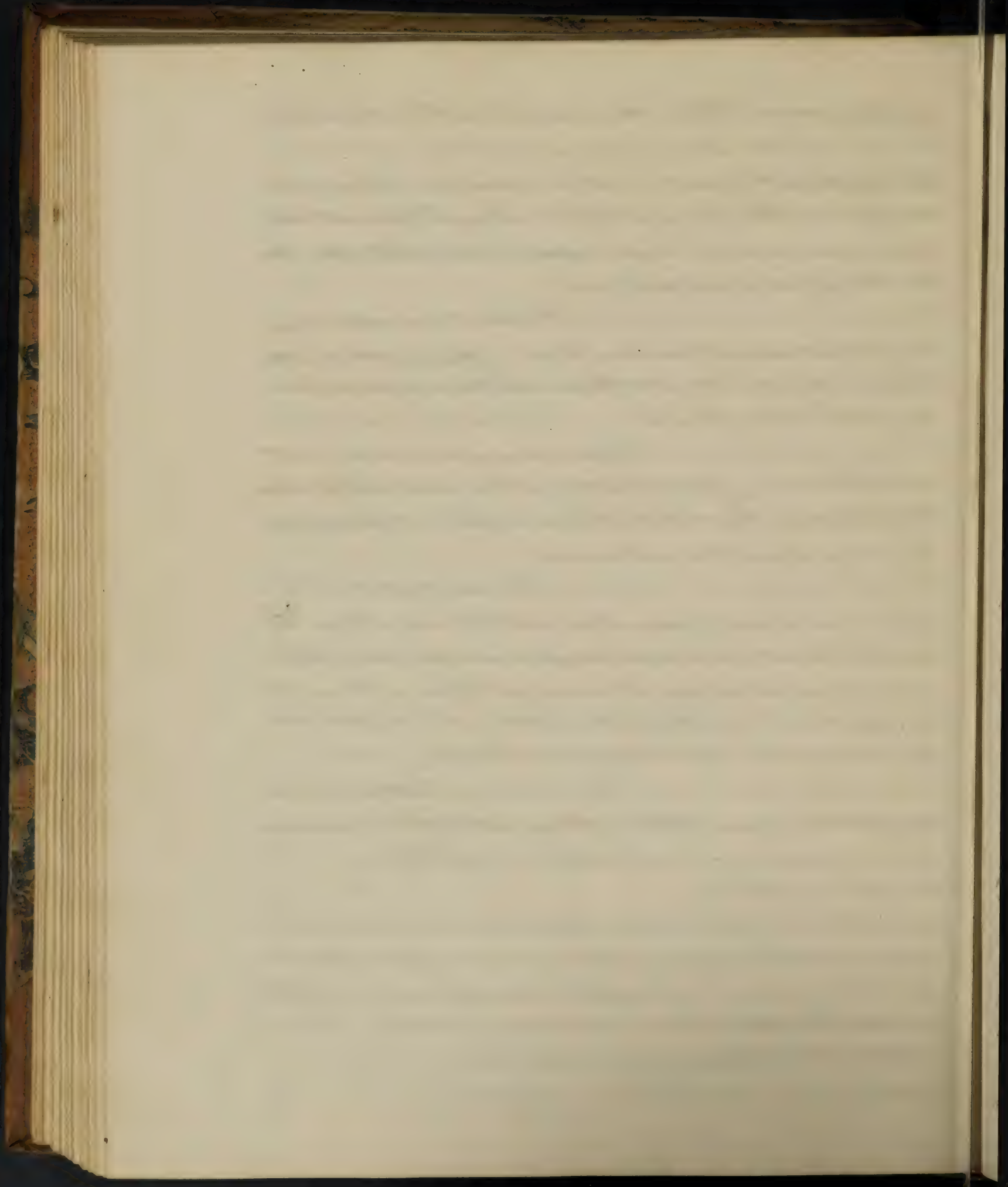
The Com. St. has virtually given awards all the powers of b. l. in this respect. If either party is dissatisfied with the award he may apply for relief to the Court. 1 Bac. 21.

An award may be set aside if Aud^{rs} exceed their commission or mistake in their own principles (Root. 261. 413) or if they mistake the law or given facts. 2 Bay 116. So in case of corruptⁿ or misbehaviour.

In Com. objections to the award are made by way of remonstrance in writing. The court will not however quib. enquire into the facts - but for mistakes in law (et sup.) appearing on the face of the award or from the examination of the award^{rs} in b. l. the award may be set aside. Kirk. 353. Root. 137. 261. 8. 2 Bay. 116.

But as to mistakes, the court will enquire of the award^{rs} only not of other persons, except in case of misbehaviour or corruption in auditors. -

In writ of account the first argument is quod computat, and on such account all articles of account, though incurred since the writ shall be included & the whole brought down to the time when the auditors make an end of their account. 3 Bar. 1086. So in the ancient writ of annuity - because a new action cannot be brought for them. -



Action of Debt

The legal acceptation of the word "debt" is a sum of money due by certain contract. Eg. by a bond for a determinate sum note, spec. bargate. 2 Bl. 154. Exp. 172.

Debt lies for a sum capable of being ascertained by argument gen^l (Long. 6. 1 St. Bl. 550) Secus in some cases on implied contracts: post. 2 Bac. 13.

Debt lies in some cases on contracts implied - but not it is said, on contracts implied to pay an uncertain sum. Ex. If A sells goods to B by parcel for a fixed price, debt lies. 9 Co. 94 ath but if no fixed price debt lies not. 12 Car. post 3 Bl. 155. 1 Ann. Bl. 550. I. Kier says it will lie, in each case, the standard being the market price. "id certum est"

That debt lies upon an implied promise to pay an uncertain sum. post. This seems to be so because lately one has been allowed to recover a less sum than he sued for.

Debt on simple cont. disused in Eng. by reason 1st of the usage of law 3 Bl. 155. Ch 219. Usage of law, what? Co. Lit 155. 3 Bl. 341. &c. Def^t. swearing that he owes nothing & compurgators swearing that they believe him. Usage of law equivalent to verdict for Def^t. 3 Bl. 343. 2^d Because the whole sum demanded must be recovered if any according to the old rule 3 Bl. 115. Ry. 219. 2 Roll. 706. 2 Bl. Rep. 1321. Long. 6. 703 n 1 St. Bl. 249. 550. lately revised. Ch B 219. i.e. Debt on simple contract, but there was no necessity for it.

In some cases debt lies not on express simple cont^l. Ex. agt an Ex^r or Ad^r. Bl. 182.

1 Lw. 200. Ch 219. No indebtedness on his part. As he should be
can - for Plt. he might have waived his law. but Ex. cant.
Esp. 172. 9 Co. 87. Cro. Cor. 187. 35. (this reason has ceased to exist.)

debt lies on promisor's note (ag't. maker) sent. Ch. 221. 10 Mod. 38. 2w. ag't.
endorser? Ch. 221. 8 Mod. 375. Bayl. 94 n.c. Gal. 173. He seems to
be in nature of insurer of the debt. Esp. 173. On principle
it will not lie ag't him. no privity.

If one promises to pay
a sum certain for property delivered to his own use, or for
services rendered to himself, debt lies, even if he promised for
another. case of debt. Esp. 173. promise, on lien extinguished by
Plff. 3 Burr. 1886. Ch. B. 220. Dy. 21. Cro Elj. 880. 2 Bac. 20. promise
to pay another's debt. here there must be a special act on the case
Esp. 173. Cro. Elj. 107. 40. 93. It will lie when the person for whom
made, is now liable sent. L^d Ray, 842. So debt lies

not for payee ag't. acceptor of a bill of Ex. He is rather in na-
ture of a surety or guarantor. Drawer is the debtor liable in
debt. Esp. 173. Gal. 23. Ch. B. 220. 1 Roll. 597. Dy. 21. 1 Vent. 152.
12 Mod 345. 2w. Ch. 220. I never say, that an endorser

may sue his endorser in debt but no one else. & that the payee
& only the payee can sue the drawer in debt. Privity is the prin-
ciple.

Rule in C. that Plff must recover the precise sum de-
clared for in debt or nothing. F. & B. 119. Dy. 219. 3 Roll. 155. This
rule is not now observed in case of debt or simple contracts
2 Bl. R 1221. Case of motion for new trial Doug. 6. 703. L. n.
1 Str. 731. 249. 59. 2 Bl. 155.

Debt lies in some cases on implied contract
Eg ag't Plff who has collected money. Robt. 206. 2 Bac. 14. Ch. B. 220. post.

And sometimes when there is nothing like a barg^m or cont.
or other commercial transaction from which to imply a con-
tract Ex. on a penal st. when the penalty is certain. (then bring
no specific mode of recovering the penalty prescribed.) 2
Bac. 14. 1 Roll. 598. This is the com^m practice in Eng^l & 6th
it is a civil action. 4 T. Rep. 756. 7 ib. 257. 9. 2 ib. 203. 3 ib. 448
bomp. 882. 4 ib. 179. To debt on penal st. "not guilty" is a good
plea. 6auth. 361. 1 T. Rep. 462. subseq. sent. - not good on specialty.
Ld Ray. 1800.

The debt lies not to recover damages, yet after dama-
ges are recovered debt lies on judg^t, for the demand is by judg^t
made certain. 2 Bac. 14. 1 Roll. 600. 1. 2 Bl. 465. Hob. 206. So
upon an awd. of arb^rs to pay a sum certain. 12 Sha. 923.
in nature of a judg^t.

When. Def^t in a judg^t is in custody on the Ex^t
debt on judg^t lies not. 4 Burr. 2482. Esp. 196. 1 T. Rep. 557. 6 ib. 507
7 ib. 420. 8 ib. 123. So if having been in custody he is discharged
with Plffs consent. Taking in Ex^t is satisfaction in law. 3 Ori.
13. 7 T. Rep. 421. 3 Burr. 2482.

So if goods to the amt. of the Ex^t are
taken. Sal 323. 2 Mod. 214. 2 Bac. 355. 1 Hob. 551. But it lies
if only part of the amt. has been levied. Esp. 196. 1 Sug 2

As to the proper time of bringing debt on judg^t in Eng^l
Houn^t. In Eng. gen^l Ex^t cannot issue after a year & a
day. 2 Bac. 361. 2 Auth. 30. 1 Sid. 351. and in this case Plff only
remedy at 6th was by debt on judg^t by orig^l writ (after such
a term pay^t was presumed.

But H. M^{rs} gave sci. fa. in this case
to show cause why ex^t should not issue drawn after a year & a

day. Plff cannot take ex^m without a sci. fa. receipt where
recept^m has been suspended some other case. 3 Wm. 362. Cro.
Jac. 364. 1 Roll. 399. 6 Mod. 288. Carth. 283. H.

It has been questioned
in Eng whether debt will not lie within a year & a day.
(1 Roll. 601. that it lies after a year) 2 W. 1 J. Rep. 637. S^o in 2^o Wm
12 that Debt is allowed on judgt^o to punish Def^t for not paying
as he ought to without ex^m - that Plff may not be put to the
trouble of suing by ex^m & therefore that the act^m will lie
within a year & a day. vide. Carth. 30. 3 Bl. 431. 1 J. Rep 637.
judgt^o in Hil. ter. & debt on that judgt^o in the next East. ter.
i. e. the next term within a year.

In Lon. no time is limited
for taking Ex^m & therefore no necessity from lapse of time to bring
debt on judgt^o after a year &c as in Eng. And it seems to be
generally agreed that in Lon. debt on judgt^o will not lie while
ex^m can be taken & the full benefit of judgt^o be attained
by it. And in C^t it would be creations to see.

But on the other
hand where ex^m cannot be taken out, debt on judgt^o will
lie. Ex. Justier &c. before whom &c. dies or is removed before
ex^m granted or satisfaction of judgt^o - Plff may have act^m on
judgt^o within 5 years. If debt does not exceed \$35 it may be
before another justice, aliter before County C^t. H. Lon. 38.

So when
great length of time has elapsed, court will not grant ex^m
debt. or sci. fa. will lie. So when full benefit of the judgt^o can
not be obtained by taking ex^m Ex. If Def^t in orig^l act^m is an
absconding debtor & Plff wishes to foreclose. Hist. 311. 421.

So if judgt^o was rendered in another State where satisfaction

cannot be obtained & Diff. has removed into this State. *Yint.* 177.

So much when Diff. wishes to obtain int. on his judgment. Latimer decided in favor of the action - But if no time is fixed, at ante. what means this rule?

An erroneous judgment will support this action for such judgment is available to all persons until reversed. 2 Bar 211. 7 T. Rep. 458. 3 Wils. 345. Rost. 176. 8 Co. 142 ^{at l.}

By the constitution of the U.S. full credence shall be given by courts in one state to judgments recorded in the other states. Can there be an enquiry in this case into the right cause of action? Art. 4. Sec. 1. S. River thinks that the very nature of our government should determine us in the negative. & the constitution he conceives to be clearly & explicitly so. It has been decided in *et. Y.* that there may be such enquiry. Contra in *Consett.* & Judge River says 5 Staty out of 8 have decided with *Consett.* Pennsylvania is with *et. Y.* 1 Dal. 188. 261. 2 ib. 302. *Cains.* 460. *Yint.* 120. 1 Johns. 426.

According to the decisions in *et. York* &c they are placed upon the same footing as foreign judgments. These are not records according to E. & they are only prima facie evidence of a legal demand. *W. G.* thinks as well as S. River that the article in the constitution must mean to place these judgments on a different footing from what foreign judgments are at *et. L.* 8 Johns 173. 86. 5 ib. 37. 9 Co. 192 5 Co. 475.

Formerly holden that debt will not lie on a foreign judgment. *Str.* 1090. Now however settled that debt will lie, but they are treated as simple contracts so far forth as they are examinable. The judgment however itself implies a sufficient consideration till the contrary is shown by *Diff.* *Dong.* 1. 2 H. Bl. 210.

Suff in declaring and not show the orig^l cause of action. 5 East. 475. n.

The proof of a foreign court is examinable here only when he who claims the benefit of it applies to have it enforced. 2 B. & C. 411. 2 Show. 232. Ray. 473. 4 Kin. 59. For it is then voluntarily submitted to the jurisd^{ctn} of our courts. See when pleaded in bar.

To debt on such a record. "null til record" is a void plea yet declaring on judgt. as a record does not vitiate the debt. prout patet per recordiam. is surplusage. Doug. 6.

The laws of foreign countries are provable as matters of fact. Cowp. 174. 5. 6 Mod. 195 2 Den. 431. 410. For such cases like auds. 3 East. 221.

Before the present constitution the C. Ct. allowed debt on judgt. rendered in other states & held that the end was to be given dyt they held that the orig^l cause of action must appear in the debt. Writ. 126. They treated such judgt. therefore as less sacred than foreign judgt. at C. Ct. Doug. 1. Showing the orig^l cause of action was not necessary on principle. The judgt. alone was suff^{cy} consid^{er}. (ante)

In debt. Ap^l concurrent with debt on foreign Judgt. Doug. 4. 5. 6. Int^l not allowed on such judgt. as on a judgt. rendered here. 1 East. 436.

Said (Doug. 6) that when in debt. Ap^l lies debt will also lie - not so in all cases. Ex. money paid by mistake - obtained by breach of trust - by fraud. by sale of property converted by a person not the owner. 3 Den. 1100. 35. The rule is to be understood in genl. (I conceive) of resp^{ts} promising to pay money & then implied from an actual contract. Ex. sale of goods without an resp^{ts} promise. Servin

rendered with express promise. De. will debt lie? ante. 1st Pl. 550

I. River should think debt will lie.

On a void judgment debt lie.

not. Ex. on a judgment obtained by fraud no action lies. (i.e. fraud in the proceedings) it is a nullity Vin. Ab. Tit. "Vacat" Ex. if the service is forged by Plff. Def. never having had notice. Upon personates another & compels judgment in his name Pra. Er. 76. 8. Ashb. 762.

So if irregularly obtained. Irregularity what? non payment of duty in bin. Proceps improperly filled up in Eng. 3 Wils. 341. 2 Pl. Rep. 845. Sta. 509. 993. 2 Wils. 47. Proceps not returnable on a day certain. Co. Pl. 514 not returnable to next court - so want of jurisdiction over the subject matter - (Vide. Fals. imp. ^{tr})

In bar. on judgment obtained by foreign attachment debt it is said lies not against the absconding debtor himself. the object being to draw property out of the hands of the garnishee - De - But debt on common judgment may be barred by foreign attachment, stating that satisfaction of the judgment cannot be obtained by C & ^{tr}. Kirk 311. 421. ante.

For money secured by bond, single bill or recognisance. the action of debt is the only C. L. remedy. Est. 198. 2 Bac. 13. Co. Edg. 494. 187. 608. It is the most proper action on one debtably given for money. So it also lies on a recognisance. Esp. Dig. 198. Sometime sci. fac. will also lie on it by C. L.

A bond be payable quod i.e. no time of payment being fixed is payable on the day of the date. 7 T. Rep. 124. When the condition was that the bond be void if Def. did not pay. - C. L. held non

may be a breach, clear mistake. Doug. 369. If a bond is given conditioned for the performance of a collateral act, there is sometimes a remedy in Chl., it being viewed as evidence of an agreement to do the act. But the C.L. remedy is an act of debt for the penalty.

In debt on bond damages may be given exceeding the penalty in certain cases. Ex. principal & Int. surmount the penalty. 2 T. Rep. 388. Doug. 49. Bar. 820. 2228. 3 Bl. 432. Pow. Mort. 146. Bunt. 232. 2 Saund. 102. 3 Bac. 691. 6 T. Rep. 303. 1 East 432 com. 1 Atk. 75. 3 Bar. 64. 489. 96. 2 Bl. Rep. 1190. 3 East 604. 4 Day. 30.

I should think it not competent for a court of law to give damages exceeding the penalty, according to the principles of the old C.L. but it is otherwise now that penalties may be chartered. Courts of C. in law have determined when it appears that the sum due exceeds the penalty, interest may be allowed on the penalty.

An cov^t to pay a sum on pain of debt lies. Stra 1087. 1 Roll. 591. If the condition of the bond is that obligor render or just & fair acct^s of money received - non pay^t of the sum received is a breach. Doug. 367. 2 T. Rep. 388.

If there is a cov^t with a penalty, Obligor has his election to sue for damages or cov^t broken, or ^{debt} ~~debt~~ for the penalty. Pow. Bar. 136. 3 Burr. 1345. Unless it appears that covenantor was to have his election to do the act or pay the penalty - In such cases on non performance of the act, cov^t lies for the penalty only. 3 Atk. 371. Stra. 533. 2 W. W. 193. 2 V. 528. 1 Bro. Cha. 418.

Debt lies ag^t an officer who has collected money

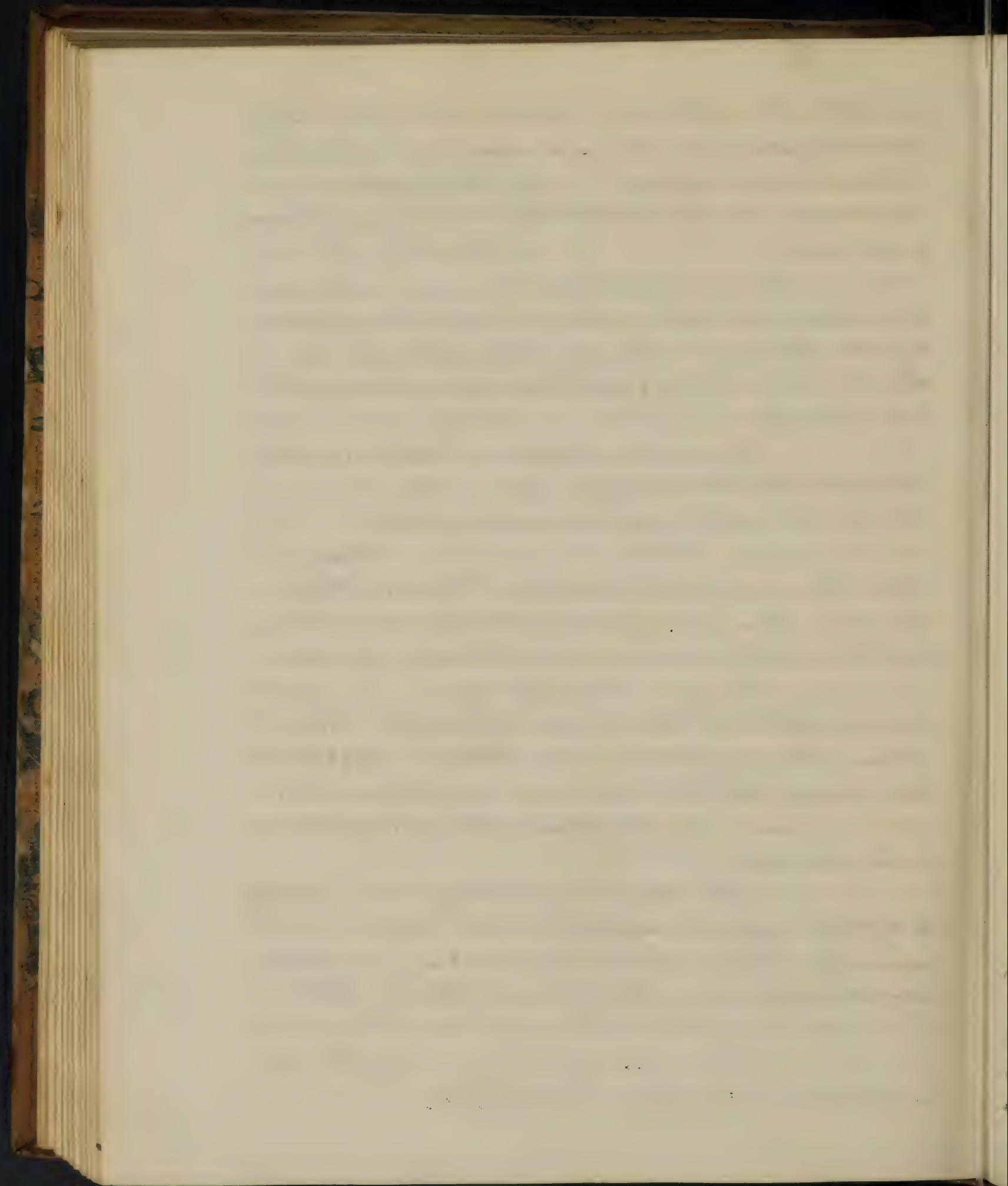
for Diff in Exⁿ (2 Bac. 14. Mo. 886. Chit. 220.) on refusal a request to pay it over. for buying it implies a contract in law. 2 H. Bl. 550. Hob. Rep. 206. By the law the original indebtedness is transferred to the Diff as it ceases on the part of the debtor.

It lies for rent reserved on a lease is the usual appropriate action, tho in some cases cov^t is concurrent. Esp. Dig. 188. Lit. 8. 9. 72. Not ag^t a tenant at sufferance by the C. L. action is a wrong done. (Esp Dig. 188) but in priority with the liq^r.

But debt will not lie for collateral articles levied & sold for want of purchasers. 2 Bac. 14. Hob 206 Cro. Jac. 515. Debt being a sum of money due &c.

But if he should return collateral articles taken & estimate their value in his return at a sum suff^t to pay the debt &c & should neglect to sell them, it would seem that debt lies ag^t him. For his own return shows that the Diffⁿ in exⁿ ought to be recovered. Hob. 206. 2 D. 207. 2 Ray. 1075. 2 Saunders. 344. The rule is not very well settled. If they had been rescued the rule would have been the same. reason is no excuse for the officer. Hob. 206. Cro. Jac. 514 2 Saunders. 344.

The H. of Comm. limiting actions ag^t Diffⁿ to 2 yrs for neglect or default returns, not to actions to recover from him what he has received or received, not a neglect, or default within the stat. (H. Com. 460)



Action of Detinue.

This action lies for the recovery of a specific personal chattel. & is in the nature of a bill in Chancery & the judgment is for the restitution of the thing detained or payment of a certain sum (which is in the nature of a penalty says Judge Rux) for the damages of detention & value. 60 Lit. 286. 3 Br. 152. 6 Cr. Jac. 361. 2 Mac. 45.

It is the only action at law in which one gets specific relief & is of use when another gets possession of something which money will not replace as a pecuniary picture. There would be an inadequate remedy because in that action damages are sent for & they are assessed according to the market value of the article. & the judgment vests the property in the Def^t.

Detinue lies to recover any personal chattel which can be identified: nor for money, even if mixed in a bag &c. Roll. 606. 12. 14 term Detinue 93. 2 Mac. 46. 7. 60 Lit. 286. It lies for a piece of gold of such a value

a 20th in money. Com. "Det." B. not for 20 in money Bro Ely 457
60th 286.

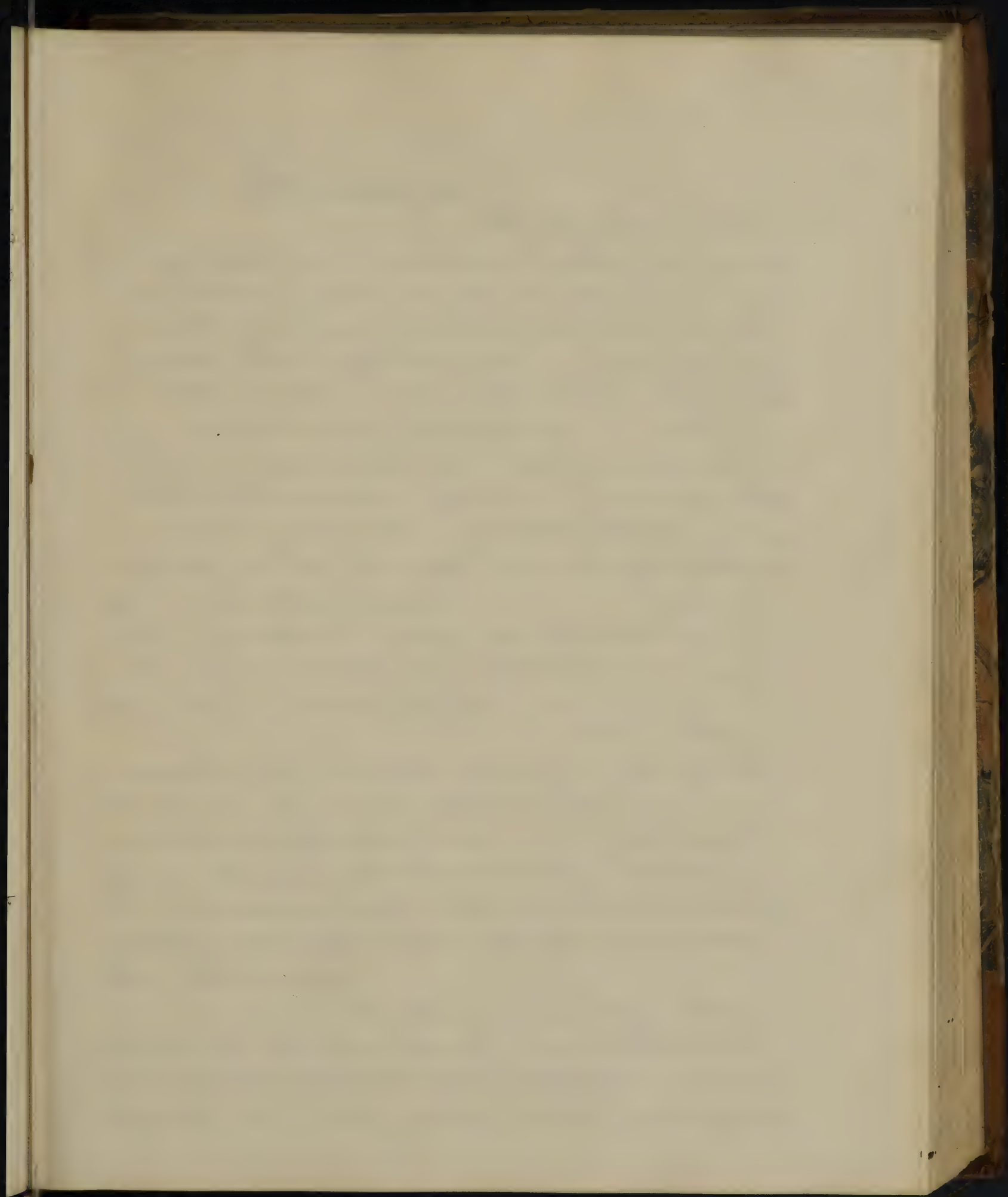
It lies in those cases only in which Def^t obtained
posⁿ lawfully as by delivery or finding. Com. Det. 2. 2 Wm
45. 1 Roll. 607. 2 Lw 20

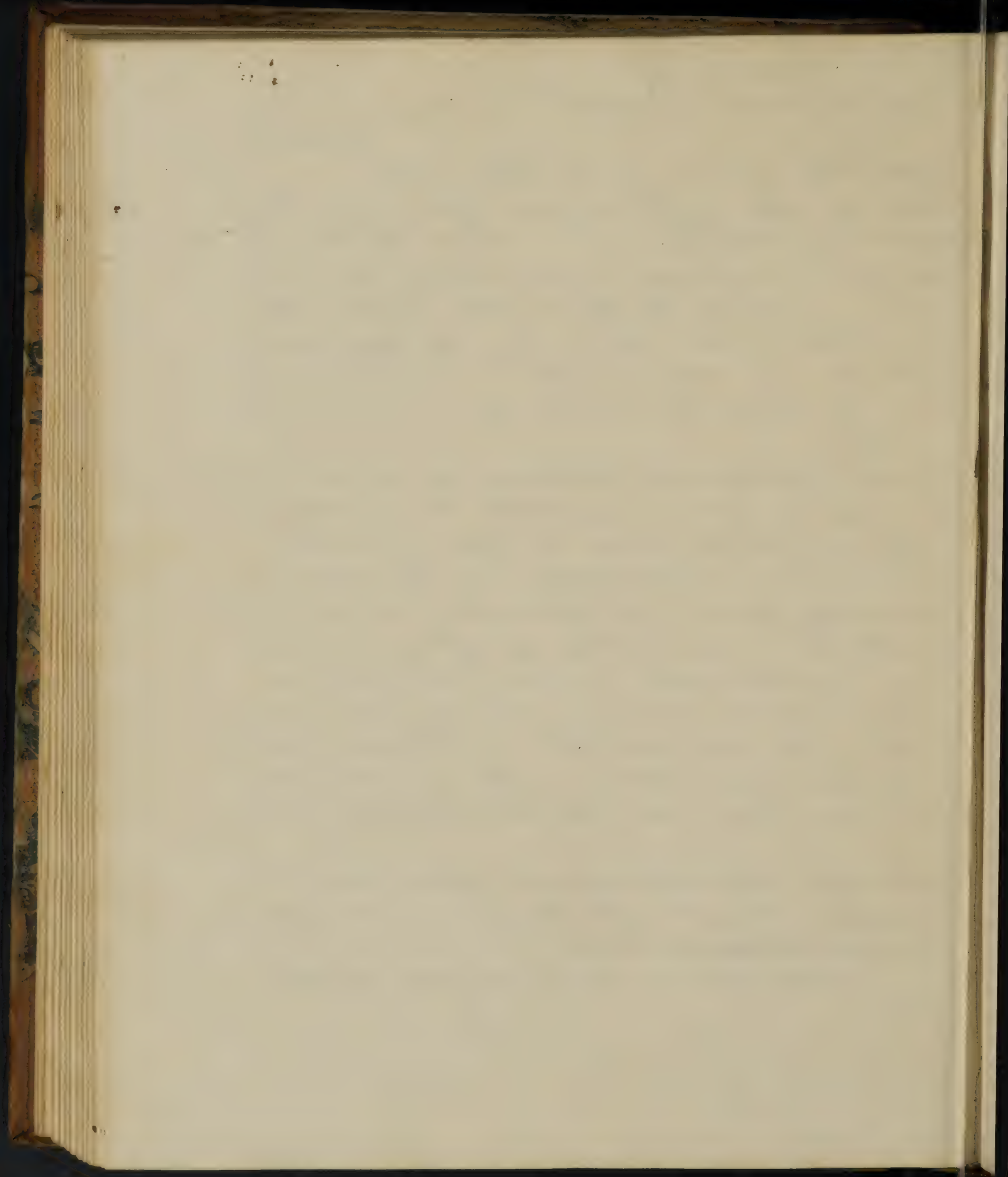
The action seems to be founded
on contract & debt & detinue may be joined in one writ
1 Wm. 4. E. L. 67. 4 Bac. 11. 1 Bac. 28. 2 Lw 40 con. Genl
nature of the action same as debt. 3 Wm. 156. Debt to recover
goods in detinue. Detinue lies not for money lent, the
lender must see to the contract. 2 Bac. 47. 6 Roll 600

Trover
lies in all cases where detinue lies. Rules hold not converse
for trover lies where the taking was tortious. Esp. Rig.

Reason why detinue lies not where the taking was tortious
seems to be that origl^y a tortious taking was considered as depriv-
ing the owner of his property. And in detinue Plff must have
the property of thing demanded. Com. "Det." 2. So that det-
inue is no remedy in such case. (But as that reason is done
away I think this action would now lie either the taking was
tortious says J. Reeve! Better reason says, J. Gould, is that
this action is founded in contract & not in tortious.
(See q^u? is there any contract in the case of finding?) 2 Wm 20

This action is disused by reason of the want of law & the certainty
required in describing the thing demanded. Trover has
taken the place of it under the E^g of the stat. of West 2^d
2 Wm. 45. 10 Co 57. an. mod. 281. See Lee 2d L. Yelw. 178.





Evidence

The admissibility of evidence is always matter of law & of course to be settled by the court. The credibility & weight of it, after it is admitted, is in general to be settled by the jury. For whether credible or not & if it is credible, what weight it is to have in proving the issue is matter of fact directly within the province of the jury. 2 A. R. 205. Doug. 360. Peake. 2. 3. Thus if in trespass or a public prosecution for a battery, the question was whether the prosecutor might prove a previous threat it is to be decided by the court. but after the evidence is admitted, whether it is suff^t to establish the fact in issue is for the jury to determine. Indeed this position is illustrated in every case where testimony is of force, its admissibility being the preliminary question. This you observe is the gen^l. rule.

When however a record is put directly in issue by a plea of nullity record, the weight & effect of the record as well as its admissibility are to be determined by the court, in this case the issue is to the court & they must determine it. For a record is of too high a nature to be tried by any thing but itself. 3 Bl. 330. 6 Co. 53. 1 Inst. 117. 260. Lawes, Pl. 146. 8. 226.

Now I would remark to you that in prop^s of law, the court tries every issue as well of fact as of law. tho it may be done by the intervention of an instrument. hence we have of trials by battle, of marriage by

certificate in fact by inspection - by usage of law, by record, by jury &c. for by b.l. the jury are merely the instruments of the court. Thus, the rule that a record is only to be tried by itself becomes intelligible.

When on the other hand a record is introduced incidentally or collaterally on an issue to the jury, it is to be read to them in evidence tho' it may be conclusive of the facts which it imports to establish. As if Peff in ejectment should exhibit a judgment & mention (levied) as evidence of his title, if a judgment should. The question then whether the record is to be tried by the court or jury is to be determined by the form of the issue, i.e. whether the record is put directly in issue or incidentally. Peake. 2 & 3.

Neither party is bound to prove those facts in the case which are not denied by the other party, for such are of course admitted to be true. Thus if a declaration states any indefinite number of facts, & defendant objects one & traverses it alone, he admits the rest, agreeable to a rule of pleading extending to all traversable allegations, 4 Bac. 2, 73. Dy. 182. B. N. P. 298.

And an admission on record by one party of any allegation by the other, precludes the party making the admission from denying the allegation on trial, a party on trial cannot deny that which he has admitted on the record in his pleadings. So as one is not obliged to prove what is admitted, the other is not permitted to retract his admission - deny the allegation, in evidence. Laws Pl. 48. B. N. P. 289 2 Mod 5. 4 Bac. 2.

The burden of proof lies regularly i.e. generally upon that party who takes the affirmative of the issue, because in general a mere negative is not susceptible of direct or positive proof, it may be in some cases, but in common presumption it is not. Peck. 5. B. & P. 297. 8. 1 T. Rep. 144. 649. 4 ib. 33. 38. Phil. 150.

There is an exception to this rule when one is prosecuted for not doing an act which by law he is bound to do. Here the party prosecuting & alleging a negative, i.e. an omission, takes the burden of proof. for to presume the negative would be to presume guilt which the law never does. This exception holds as well in civil as criminal cases. Thus suppose a turnpike Co. whose duty it is to repair a bridge or highway is indicted for not doing it. the Def. is not bound to prove that repairs have been made, prosecution must prove that they have not. The negative is here easily proved. but the facility of proof in this case makes no odds. And it is true in all cases that when one is charged with the omission of a legal duty, the prosecutor is bound to prove it. Gibb. Ev. 148. 3 East. 192. Comb. 87. 10 East. 216. 2 Bl. R. 851. 2 Barn. & C. 654. Phil. 151.

One perceives a manifest difference between the last case, & one in which there is a charge of a positive wrong as of trespass or theft, here the party taking the affirmative, takes also the onus, the party charged is not bound to prove himself innocent, so that the general rule applies.

If issue is taken on the life or death of a party ever existing, the onus lies on the party alleging his death. The rule I trust does not

depend on the mere form of the issue, but upon the substance of it. For being on evidence, the law presumes him to be so until direct or presumptive evidence of the contrary appears. This is evident by the case. Def^t need not show the ancestor to be alive, it is for the him to prove him dead. This being the reason of the rule, it can make no difference what form the issue is in, i. e. whether affirmative that "J. is dead" or negative as "J. is not now living." This issue is often joined. I think the rule as laid down is universal. Peck. 313. 2 Roll. Rep. 261. 2 East. 312. Phil. 152.

When however a person once existing, has been absent, untraced of, for 7 yrs the law presumes him to be dead. This was introduced as a positive rule by the stat relating to bigamy. But it has been extended by analogy to all cases to which it was applicable. So that the fact that J. is ever alive and that he has been absent 7 yrs are barred of being proved, it throws the onus on the other party who wishes to prove him living. the presumption of death being once raised remains conclusive unless rebutted. 6 East. 80. 85. 2 Campb. 113. Phil. 152.

So also when a legal marriage is proved between two parties, the issue of the mother born during wedlock or within a competent time afterwards, are deemed to be legitimate. This presumption is conclusive until rebutted. These two facts admitting, the onus is thrown upon the party who contests the legitimacy, who is on the negative of the question. Phil. 112. 152.

No other evidence can be received upon the trial of an issue than such as is pertinent to the issue or matter of fact in dispute. Any other evidence than this is called in law, irrelevant. i.e. inapplicable & therefore inadmissible, for it does not conduce to prove or disprove the matter in dispute. Peak. 6. 2 H. Bl. 205.

Hence the character of either party in a civil action cannot be called in question unless it be put in issue by the proceeding itself. The books do not tell us what is meant by putting the character in issue, leaving that to be inferred from the examples. I presume the meaning of the rule to be, that the character cannot be called in question unless the proof of it would conduce to prove or disprove some matter of fact involved in the issue, and when such evidence would thus conduce to it is admissible, the character then being in issue. B. & P. 206. 8. Phil. 139. Peak. 6.

Thus in an action for fraud. Plff. is not at liberty to prove that Def^t is reputed a knave - nor in an action for slander that he is addicted to defamation, because those facts if proved would be perfectly immaterial as they would not conduce to prove the particular fact in issue. - the evidence is irrelevant & is ane.

Now is the Def^t in such cases allowed to support his character by proving the contrary. Thus if a man is in battery. I cannot prove that he is peaceably disposed. nor if sued in slander, could he prove that he is not addicted to slandering, for altho he might be able to prove that, still he might have spoken the words charged

The widower then does not in any degree which the law regards, conclude to prove the matter of fact in issue.
3. 1st. 296. 1st. Ev. 140. 1st. K. 6. Phil. 139. 2d. Bos. 44. 532. n.
3d. Cam. 1st. 20.

But there are civil cases in which the character of a person may be not in question because the suit itself puts it in issue. Thus in an act of crim. conv. Deft. is permitted, in mitigation of damages, to impeach the gen^l character of the wife & also to prove particular instances of her incontinency with other persons (altho she is not party to the record).

The reason of this diversity is that the Dft. by charging the wife with seduction, puts the wife's reputation for chastity as well as her gen^l character in issue. & it would be an abuse of language to say that one had reduced a prostitute. 1st. 296. 1st. Ev. 140. 31. 4th. 657. Phil. Ev. 113. Phil. 139. 1st. K. 7. 2d. Esp. Ca. 562.

But in the case last mentioned Deft. is not admitted to prove instances of the wife's misconduct subsequent to her incontinency with himself - it would be taking advantage of his own wrong - inasmuch as his own previous misconduct might & probably did induce it. 2d. Esp. Ca. 562. 1st. Ev. 31. Phil. 139.

So also in an action for the breach of marriage promise, Deft. is allowed to impeach the gen^l character of Pft. for chastity & to prove instances of her lewd & licentious conduct, for the Pft. - considered as putting in issue her act & conduct in issue by instituting the action.

and the evidence is admitted on the same ground that it is
in the case of crim. con. 1 Selw. 31. n. 3 Map. R. 189.
3 Esp. Ca. 236. 1 John. Ca. 116.

Indeed in a recent case
before our sup^r court in Cal. it was determined that
Def^t in an act for breach &c. was at liberty to impeach
the moral character of Plff in any respect, for an
abandonment of character not before known might
operate in a well regulated, delicate mind to break
off the engagement. Welch & Robbins not reported.

The Eng rule relates only to the character for chastity, in Cal
it extends also to the character for truth &c.

In this class of
cases it has been held in Cal. when Def^t demands the Plff. that
evidence as to her genl. character cannot be admitted
in reference to the time between the making of the promise
in the breach of it. 3 Map. R. 189. also then decided that
particular instances of misconduct in delicacy or prostitu-
tion might be. In 1 John. Ca. 116 this distinction ap-
pears to have been overlooked.

So also in an act by a parent
or master for seducing his daughter or female servant, per
quod servitium amittit, the Def^t may in mitigation of
damages impeach the genl. character of the daugh-
ter or servant for chastity or prove her conduct to have been
licentious. 1 Root. 472. 3 Wils. 19.

But how it may be established can
this affect the issue, the gist of the action is the loss of
service, to this I answer that although the loss of service is
the gist of the action, still it is not the rule nor the princi-
pal

ground of damages, a loss of service (no matter how small) is truly indispensable, but the real ground of damages is the wounded reputation & affections of the Plff. and the most aggravated damages are often given when the loss of service is merely nominal. Esp. D. 645. 3 Wils. 19. Lawes Pl. 67. 8. 11 East. 23. 5. 2 Selw. 1087. 2 Lev. 63. see Parent & Child

In an action of slander it is constant practice in Eng^d to permit Def^t in mitigation to impeach the gen^l character of Plff as to the existence of the fact or species of crime charged by the words laid. as when the charge was of forgery. evidence respecting the Plff's gen^l character was admitted for Plff set up his character to be good. & the evidence goes to the point of damages. 1 Root. 354 So if the charge were of theft Def^t may prove Plff's gen^l reputation to be that of a thief under gen^l issue. So an charge of bankruptcy that Plff was generally reputed to be a bankrupt. This question arose in N. York & the courts (2 Judges) were equally divided 1 Johns. 46. the question being as to admission of evidence on gen^l issue as to Plff's gen^l character. No rule in Eng. like that in Eng^d

There is a particular instance in the Eng. books, which is a case *veri genis*, where Plff having laid special damages by loss of office, Def^t is at liberty to show that his gen^l reputation was as such that his fall left him, & they show that it was not in consequence of the slander that the disputation took place. - 2 Camp. 251. Phil. 140.

In actions of slander the Plff may give in evidence his rank & condition in life

for the purpose of aggravating the damages & tho I am not apprized of the adoption of this rule in terms in Eng. yet it appears to me to be obviously correct. 3 Mass. R. 551. Phil. 140. m.

And on the other hand Def^t may exhibit evidence of the same kind for the purpose of mitigating damages when such proof will tend to mitigate them if true.

In an act. for malicious prosecution Def^t may show Plff's bad character to be bad by way of showing probable cause, this action lies if in the orig^l action there was malice want of probable cause, and in this particular species of action probable cause is a justification, the qualification of Plff if bad rebuts the presumption of malice & goes in a high degree to prove probable cause. And the character is put directly in issue in that respect in which it is attacked. 2 Esp. Ca. 720. Phil. 139.

In criminal cases also when Def^t's character is put in issue by the prosecution, the prosecutor may attack his character generally by proof of particular facts, for otherwise it would be impossible to prove the charge or support the prosecⁿ. Bull. N. P. 296. 1 Mery. 324. Pea. 4.

But which, it may be asked are those cases in which Def^t's character is put in issue, there is no definition or description given in the books by which this question can be answered, from the examples I should think, that a criminal prosecution puts Def^t's character in issue within the meaning of the rule, when it charges a habit or course of

criminal conduct as contradistinguished from individual or specific acts. In such cases the prosecutor may attack the genl. character by proof of particular facts not alleged in dect. as when one is indicted under a genl. charge of keeping a bad house, not of particular acts of lewdness. it is a charge of a course of criminal conduct which puts the genl. character in issue. So also if one is indicted as being a common barrator, his genl. character is put in issue within the meaning of the rule. To support the indictment which is a genl. charge particular instances may be proved. So of the C.L. offence of being a common scold. (an instance of which occurred in Boston a year or two ago.)

But on the other hand an indictment for forgery, theft or swindling does not put the genl. character of D^f in issue & the prosecutor cannot prove any other instance of theft be than that alleged or that D^f's genl. reputation is that of a thief &c. (the charge being of a specific act.) unless indeed D^f has first introduced evidence of his genl. reputation (of wh. post)

But there are cases of this sort, in which the prosec^r is not allowed to rely as to particular facts, without giving previous notice of them. viz. when one is indicted for being a common Barrator. This rule is founded in the presumed stupidity of depending without such notice, as the indictment is most usually against lawyers whose legal business it is to carry on suits. B. & P. 296. 1 McCay. 324. Peak. 7.

But in other criminal cases (i.e. cases in which character of Def^t is not put in issue) the prosecutor cannot examine into Def^t's character either in relation to particular acts or his gen^l reputation, unless the Def^t himself commences the inquiry, as when one is charged with theft, forgery &c. - this charge does not put the character in issue. B. & P. 296. 1 McHy. 324. a particular fact merely is put in issue & not the gen^l char^r course of conduct or habit of Def^t.

And even if Def^t has opened the inquiry on his part by exhibiting evidence in favor or support of his character, the prosecutor cannot examine as to particular facts not alleged, but as to the gen^l character only. because it is not to be presumed that Def^t is prepared to meet particular charges not put in issue, without notice. Thus it is inadvisable for the Def^t to influence the verdict by producing evidence of his character, the prosec^r may then adduce evidence to prove that it has the gen^l reputation of being a thief. but not that he has stolen on any other occasion. and when his character is not put in issue, there is in judg^t of law no notice. 1 McHy. 324. B. & P. 296. Peake. 7. 8. Sw. 141.

And in criminal cases when the Def^t's gen^l character is put in issue by the prosec^r he is indulged in proving his gen^l character good. It is obvious that such evidence no more conduces to prove the issue, than that which is offered in the first instance by the prosec^r to prove Def^t's character bad. Upon the strict principles of evidence there is clearly no difference. This indulgence

this is not founded in principle. but in the benignity of
the law to persons charged with crimes. 1 Mcry. 320. 322.
Phil. 140. Peake. 8. Geo. 141

Thus if one is indicted of theft the pro-
secutor cannot in the first instance prove that Def^t character
is that of a dishonest man. but Def^t may establish his
character for integrity &c. so in indict. for forgery. perjur-
ing &c.

This indulgence was formerly allowed only in favor of
petty larceny but it is now extended to cases not capital or misdemeanors
provided the direct object of the prosecution is to punish
an offence. not barely to collect a penalty. 1 Mcry.
320. 2 B & P. 532. in Peake 8. Phil. 139

But Def^t is not
thus indulged in actions for non payment of penalties inflicted
by penal statutes. these actions & informations not being
regarded as purely crim^l proceedings or direct prosecutions
for crimes, but as suits to collect a sum of money. If then
one is prosecuted for a penalty he cannot in genl. be permitted
to prove his genl. character good but if he were indicted at
C.C. for the purpose of punishment for a similar offence
he would receive that indulgence.

Mr Peake says in-
deed, that this indulgence is extended to prosecutions for
those offences only which incur corporal punishment
his authority however. 2 B & P. 232, does not support
him. and I conceive it to be immaterial whether the
punishment be corporal or not, if the process is com-
menced directly for the purpose of punishing the of-
fence. 1 Mcry. 320. 1. 2. Phil. 140.

So also in an indictment for a rape, the prisoner may give in evidence that the woman's character for chastity was notoriously bad, and that he had previous illicit intercourse with her. for these facts go to diminish the probability of violence. But he cannot prove his intercourse with other persons particularly, because this would not have the same bearing on the issue. Phil. 140.

Evidence in support of the Deft's character in a criminal prosecution may be particular as well as general. i.e. a witness may not only testify in favour of Deft's general character, but he may also assign reasons in the life and conduct of the Deft. for his good opinion, as particular instances of honesty and integrity that have occurred within his own knowledge.

But the witness as to the character of Deft must be general only. Particular facts cannot be adduced for the reason before given viz. that he is not supposed to be prepared to answer any specific charges of which the prosecution does not give him notice. 1 McCay. 322 to 5. B. & P. 296.

It may be observed however, that when the evidence of guilt is weak or merely presumptive, such evidence of Deft's character may be very important, yet in opposition to the direct evidence of a credible witness it can have but little effect. It might be of consequence also when the evidence was nearly or quite in a *quælibet*. Phil. 140. Peak. 8. 2 Maff. Rep. 317.

We have now considered the general rules relating to the relevancy of evidence.

It is a general rule & applicable to all cases, that the best evidence which the nature of the case admits must regularly be produced, withholding this & exhibiting evidence of an inferior or secondary sort of force presumption, that the party would operate against the party producing or offering the latter. Secondary evidence is therefore not to be admitted when it appears that there is better evidence within the power of the party. 1 McCly. 342. Peck 8. 102. Sw. 157.

Thus if a party wishes to prove the contents of a written instrument in existence & in his custody, the instrument itself must be produced, and it is not competent for him to prove the contents of it either by parol evidence or by copy. He must produce it or fail in his suit. 10 Co. 92. 1 McCly. 356, 360 & ib. 468. Peck. 9. (As to instruments lost or in possession of adverse party see post)

Also if a deed or other written instrument is attested by a subscribing witness, the execution of it can regularly be proved by no other evidence than his, for being selected by the parties, he is considered the best witness. This comes within the general rule requiring the best possible evidence in all cases, for exceptions see post. Esp. 257. & Doug. 205 & 216. 4 East. 53. 2 ib. 183. 1 Esp. Ch. 89. Sw. 25. 6. Leach. C. C. 284. 2 East. 183.

But the law does not require that all the evidence which might be obtained should be produced.

Since the evidence of one of two or more subscribing witnesses may be suff^t to prove the execution of an instrument. Peck. 9. Sw. 27. 8.

In gen^l. no precise number of witnesses is necessary at C. L. to establish a fact: the gen^l. rule is that such evidence as satisfies the triers is suff^t to support any issue. Of course an credible witness is in gen^l. all that the law requires to prove any fact, this rule however is not universal. 1 Inst. 6. 5. Carth. 144. 1 Show. 158. 1 Mich. 16. Phil 107. Sw. 142.

Thus in a prosecution for perjury two witnesses are necessary to a conviction. for if there is but one witness there will be only the oath of one person ag^t. that of another & at the time of taking the oath in question the person indicted was as competent to testify as this witness and he continues so until convicted. the case is precisely the same as if both had appeared upon the trial of the same cause & contradicted each other so that we have only oath ag^t? oath. And altho the oath of one witness might be suff^t to satisfy the triers still the law from the danger which might ensue is pre-emptory in requiring two. 4 Bl. 358. 10 Allox. 194. 1 Mich. 37. Phil. 107.

The rule however does not absolutely require that there shall be two witnesses testifying to precisely the same fact. but it means as now understood that there shall be some independent evidence in addition to the testimony of one witness. Phil. 108.

In high treason also & petit treason & misprision of treason two witnesses are required by our Eng. stat. the first of which is that of 6 Ed. 6. Those statutes however do not extend to every species of treason as debasing the current coin, counterfeiting the King's signet &c. 4 Yel. 356. 7. Forst. b. 6. ca. 240. 244. 1 McMy. 152 to 21. Phil. 84. n. 108.

That such was not the rule of the C. L. see 2 Hawk. Pl. C. ch. 25 sec. 129 3 Keb. 68. 1 McMy. 16. 31. Phil. 108. La Boker says it is a rule of C. L. 3 Inst. 26. but the weight of authority is against him. This may be a question of moment in some of the states.

Confession by a witness of the commission of an overt act is not sufficient evidence unless corroborated by other evidence. Phil. 84.

And in cases of Treason it is required by Stat. of Mass. that both witnesses testify to the same overt act or one of them testify to one overt act & the other to another, i. e. that each testify to an overt act, otherwise the prisoner cannot be convicted except upon confession in open court. 4 Yel. 357. 1 McMy. 21. 34.

But by the constitution of the U. States, not only two witnesses are required, but both must testify to the same overt act, or there can be no conviction except on confession in open court. Con. art. 3. s. 3.

The rule requiring two witnesses in cases of treason extends only to overt acts of treason. collateral facts i. e. facts not constituting nor tending to prove the act, may be established by one witness like any other fact. thus that the Def^t is a natural born subject, when he lives &c. Forst. b. 6. ca. 240. 5 H. Tr. 634. 1 McMy. 34. 5. 268.

and a similar distinction obtains as to the rule of evidence in the case of perjury. collateral facts that do not constitute the perjury, no go to prove it may be established by one witness. as the taking of the oath under which the crime is alleged to have been committed. 1 McCre 27.

It is also a rule in *Chancery* founded on the same principle as that which governs in the case of perjury. that if *Def't* answer is contradicted by one witness only, the *Pf* cannot have a decree for the answer being under oath, there is only oath against oath. 1 Km 161. 1 Vy. 66. 95. *Tr. Cha.* 19. 2 *Pow.* Con. 216. *B. N. P.* 285. 3 *Attk* 646. 2 *Vy.* Junr. 243. *git.* 282.3. 7 *T. Rep.* 667.

But as in our *Chancery* practice the answer is not under oath the rule cannot hold in *Chancery* principle. I have never known it applied.

And by the Stat of *Conn.* no person can be convicted of any capital crime but upon "the testimony of two or three witnesses or that which is equivalent," *Att. Gen.* 685. *Sec.* 142. The last expression "or that which is equivalent" is very vague, it is however established in construction, that under that stat. it is not necessary that two witnesses should testify to the same fact or facts, one may testify to one part of the transaction & another to another part, or the testimony of one may be direct & that of the other circumstantial or presumptive, or all may testify to facts more or less by circumstantial and in either of these cases if the testimony be satisfactory & the witnesses credible the

Many may convict under the statute. —

All testimony in a court of justice is regularly given under oath. & the declarations of a stranger, i.e. one not party to the suit are regularly no evidence unless they are made in court and under oath. Hence even if a Judge or Juror is acquainted with any of the facts in issue, he cannot act from this knowledge unless he is sworn & testifies like any other witness. 1 P. W. 146. 2 Mod. 99. Peak. 10.

It follows also from the same genl. principle that hearsay evidence is in genl. inadmissible. By hearsay evidence, is meant testimony by one person of what he has heard another say. This is inadmissible for two reasons. 1st the witness does not testify respecting the fact in question, but to the declarations of another person respecting that fact, not made in court nor under the sanction of an oath. 2^d There can be no cross examination as to the fact in issue. the witness has no knowledge of that, it is only the declarer that he testifies to. and this impossibility of cross examn^t is objection suff^t to rule out evidence generally. Gilb. Ev. 107. Peak. 10. 11. Phil. 173. Bul. N. P. 294. 3 T. Rep. 721. 2 East. 27. 54. Lew. 121. Esp. 784. 1 Mod. 283.

The genl. rule as to hearsay evidence admits of exceptions when the fact in question is in its nature in common presumption incapable of positive & direct proof as an question of custom, prescription & pedigree. the reception is matter of necessity. for these facts cannot be expected to be proved otherwise than by common

reputation. Bul. et D. 233. 1 McMy. 303. Esp. D. 738. Bea. 11
Sw. 121. 2. Lib. cane.

Thus on a question of custom or prescription which can be proved only by usage, genl. reputation may be proved by hearsay evidence. E.g. a witness may state what he has heard from dead persons respecting the reputation of the right or what was the common belief or opinion respecting it. But not what such persons have said relative to facts showing the exercise of that right. They may state that they always supposed there was such a right, & what deceased persons have said concerning the existence of it, but not what they have said as to the exercise of it. Peck. 13. 1 T. Rep. 466. 5 ib. 26. 31. 2 Ky. 512 12 East. 62. 14 ib. 327. 331.

Hence on a question respecting ancient limits or boundaries, a witness may testify what was formerly reputed the limits of the farm or town &c. & what deceased persons have said respecting them. But not what such persons said relative to the former existence of a monument, building or wall in such a place for this would be evidence of a particular fact not of genl. reputation. 2 T. Rep. 53. 14 East. 331. n. Phil. 182. 3. Peck. app. x 69.

Evidence of reputation is upon the same principle admissible in questions respecting a right of way. Peck. 12. Bul. 295. As are the depts. of deceased strangers i. e. in relation to the reputed existence of the right but not of any specific exercise of that right such as are cognizable by the senses. Bul. 295.

So also on a question

whether such a piece of land was formerly part of such an estate, the dect^y of a dec^d tenant are evidence as to the generally rec^d opinion. 2 Q. R. 734. Phil. 182. 2 T. R. 53. Pea. 13.

So also the dect^y of dec^d parishioners, made when no disputes existed may be proved to show what were reputed to be the parish limits. Peak 13. app^t. 33

And it is a rule of daily practice that the dect^y of dec^d owners ^{of land} restraining those limits claimed by persons holding under him may always be given in evidence. Dect^y extending such limits cannot. This rule is founded in the principle that a man's conceptions may be improved a gt. time, it extends to grantors & ancestors in fee^{ty} or while owners. 5 T. R. 123.

On questions of pedigree the gen^l rule that hearsay evidence is not admissible is more relaxed than upon every subject whatever. In these cases the dect^y of deceased persons who from their situations would be likely to know the fact in question, may be given in evidence, as facts of this kind can frequently be proved in no other way. Ex. Dect^y of dec^d parents upon a question of legitimacy, whether a child was born before or during wedlock, i.e. whether it was or was not legitimate. Cowp. 591. 3 T. R. 719. 6 ib. 330. 2 H. R. 84. 10 East. 120. B. & P. 112. 294. Esp. 2. 784. 5. Sw. 122. Peak. 11. 12. 182. 3.

But the dect^y of dec^d relations are admissible in those cases only when they are supposed to have been made without any interest or bias in the person who made them, for if

he has made a dict^m respecting the pedigree of another, when there was a suit pending or in contemplation of which he is or is expected to be a party, the dict^m cannot be proved. On this subject however there is contrariety of opinion, some saying that such a circumstance would only go to the credibility of the dict^m: the better opinion seems to be that it goes to its competency & will exclude it. Phil. 176 to 179. Vin. ab. "Ev." T. b. 14 East. 331. Corp. 594. 1 Selw. Ct. D. 684. 3 Cornpb. 444.

But the dict^m of parents are not admitted to prove non access during wedlock, this is forbidden by considerations of morality, decency & policy. by h. l. parents cannot thus bastardify a person born after marriage. Corp. 591. 2. Bul. Ct. D. 112. Phil. 180. Esp. D. 485. Lew. 123. 8 East. 203. 11 id. 133. "Par & Ch."

Dict^m of men strangers, as of d. c. neighbours, are not admissible in questions of pedigree, for they are not supposed to have the best means of knowledge on the subject. 3 T. Rep. 723. 1 Mch. 312. 13 Vy. Jun. 147. 514. 14 East. 330.

But it seems that the dict^m of a deceased surgeon as to the time of a birth which he attended in his professional character, may be given in evidence, as may any memorandum made by him, and this evidence may be of great consequence, Phil. 181. 10 East 120. Vin. ab. "Ev." T. b. 91.

Altho the dict^m of a stranger are not admissible in evidence upon a question of pedigree, yet the gen^l reputation of the neighbourhood or place to which one belongs is ad-

admissible. & for this the gen^l reputation of a family (as to the legitimacy of a child) is admissible. Peak. 11.

In all these cases however the death of a relative cannot be admitted if the party who made the death is living & can be produced in court. He should appear personally. So that in the above exceptions to the gen^l rule relating to hearsay evidence, the deaths declared to be admissible were presumed to be dead or in a situation not to be produced in court. 2 Stra. 924. B. & P. 113. 3 Campb. 457. Phil. 176.

But to prove the state of a family as to marriages, births & deaths, the question of legitimacy not being involved, the death of any deceased person likely to know the facts, & the gen^l belief of the family is good evidence, as to the question whom it married, what children he had, whether he died abroad &c. Bul. N. P. 294.5 Esp. D. 738. 785. Peak. 12

• Included for this purpose a recital in a deed, a special verdict between members of the family stating pedigree, monumental inscriptions, funeral books, family bibles, & records in other books, or will made an ancestor & cancelled, overmatters in a bill in Ch^l, engravings on rings & trinkets, & all permanent family memorials are good evidence to prove pedigree. B. & P. 294.5 Esp. D. 738. Phil. 175.6. 11 East 535. 13 V. Jun^r 144.

But altho hearsay may be good evidence of pedigree it is never evidence of the place of our birth for that does not present a question of pedigree, but a simple point of locality to be proved of course like any other ordinary fact. 8 East 539. 3 D. Rep. 707. Phil. 180

1 East. 373. 2 ib. 27. 52. 62.

In some cases a memorandum in writing made at the time of the transaction in question, by a dect. person in the ordinary course of his business, is, with other circumstances admitted in evidence. This is not strictly hearsay evidence as it is derived from the act rather than the dect. of the person making it. Thus a mem. by a clk or agent of good v. p. by the principal is good evidence to prove the delivery. Peck 14. Salk 285. 690. Sta. 1129.

But cases of this kind turn so much on their own peculiar circumstances that it is diff. to lay down any genl. rule respecting them. For example, you may see further. B. & P. 282. 3. Salk 245. 280.

I would observe by the way that such a mem. is never admitted in evidence of itself unless the person who made it is dead altho he may be abroad & out of the reach of process or sick Phil. 194. 5. 1 Esp. Ca. 1. Peck. 15. m.

But a mem. or book entry made by a party himself is never in itself evidence tho it may be so in connexion with corroborating evidence, thus such an entry was admitted to confirm the testimony of a witness who swore he saw the delivery & that he had seen the entry. The mem. here was not evidence of the fact in question but to corroborate the testimony of the witness. If the entry & a not been found his testimony would have been shaken. 1 Esp. Ca. 328. Peck. 14. 15.

Shop books are admitted in many of the states as evidence of goods sold & delivered

or of work & labour, how far they are competent evidence
see Phil. Dunlaps id. 199. note. 2 Mass. Rep. 217. 569.
4 ib. 455. Sw. Ev. 81. 2. 1 Day. 104. 1 Dal. 238. 272. 85. 4 ib. 153.
1 Binney. 234. 1 Bay. 40. 2 ib. 172. 8 Johns. 212. 11 John. Rep
246. 12 ib. 461.

In criminal cases the rule excluding hearsay evidence appears to be somewhat more strict, than in civil, but it may be admitted by way of inducement and is termed, for the purpose of explaining or illustrating that which in itself is proper evidence as well in the former cases as in the latter. As when a prisoner had made some declaration as to the truth of certain reports respecting his guilt & with respect to his conversation with the prisoner may state what the report was, that his testimony may be intelligible to the Jury. 1 McCly. 360. 282. 297. 299. 301. B. & P. 294.

But there is an important exception to the rule relating to hearsay evidence, in process for murder or as a prisoner, for any species of homicide, viz. that the declaration of the declarant made under the apprehension of death, in relation to the commission of the offence, or accusing or exculpating some one, are admissible evidence, for this situation is considered as creating a sanction equal to that of an oath. Leach. Cr. Ca. 563. 567. Sta. 499. 1 East 2d. Cr. 353. 1 McCly. 381. Sw. 124. Peck. 15. 16.

But declarations made by a person legally infamous, as an attainder felon, are not admissible. Indeed declarations made by a party in extremis are never to be admitted, unless his oath if he were in a condition to take one, would be such in a court of justice, the same

tion arising from the consciousness of approaching death being only equal to an oath. Leach. Cr. Ca. 308. or 378. 1 McC. Nally. 387. Peck. 16. Sw. 125.

The death of a person mortally wounded but not at the time under the apprehension of death are not admissible, for here the sanction is wanting. Leach. Cr. Ca. 364-97. 563. 1 McC. 383. 5.

It is not necessary however for the purpose of making such death admissible, that the party making the death should actually have expressed any apprehension of approaching death. If it can be inferred or collected from the circumstances of the case, that he was under such an apprehension, they are evidence. 1 East. 21. Cr. 353. Leach. C.C. 563. 1 McC. 383-5. Sw. 124.

It seems then that the question whether such apprehension did exist or not must in the first instance be decided by the court, for the purpose of deciding whether the death are admissible. If they are not admitted this decision is conclusive, but if they are, the question is still open to the jury notwithstanding the opinion of the court & if they are finally of opinion that the party was not under the apprehension of death they are not to regard the evidence at all. Leach. C.C. 563. 364. 397. 1 McC. 383. 6. Sw. 125.

This is analogous to the case of one declaring upon an instrument lost or destroyed. He cannot prove by secondary evidence the contents of the instrument until he has satisfied the court that the inst. is actually lost or destroyed; & after the secondary evidence is admitted if the jury are satisfied that the inst. is not lost or destroyed they need not regard this

secondary evidence at all. It seems then that in these cases the competency as well as the credibility of the evidence is to be determined by the Jury in the end.

The dying declarⁿ of a person declar^d are under the same limitations admitted in civil cases. Thus upon a question as to the genuineness of a man's last will, the declarⁿ of a witness made on his death bed, that the testator had made a former will but that he had destroyed it & forged the one in question, were admitted. 3 Burr. 1244. 1255. 6 East. 188 1 McCly. 386. Sw. 125.

So also what a declar^d person has sworn before on a trial between the same parties may always be proved. 'Secus if the parties are diff^t' so if the present parties claim under the orig^l parties. Whether the cause of actⁿ is the same or diff^t is immaterial. The evidence in this case is under oath & the parties can cross examine. 1 McCly. 283. 5 T. Rep. 373. Sw. 125. Fort. C. C. 337. 2 Hawk 605. Peak 60. Kirk 259. see Phil. 199.

And what an absconding witness has sworn ⁱⁿ a court of enquiry may be proved ag^t the prisoner if it appears that he procured the witness to abscond for it is the prisoners own fault that the witness is not then in person, 2 Hawk. 605. 1 McCly. 285. 6 T. Rep. 55. 1 East. 572. 1 Root. 76

What one of the parties to a suit has said in relation to the matter in issue may always be proved ag^t him by the other, a persons confession being always good evidence ag^t himself 7 T. Rep. 663. Peak 16. Phil. 71.

Such confession by a party however

is not conclusive ag^t him, for he may prove that the statement
he made was incorrect, whether it was made so by design
or mistake, it does not operate like a record between the parties
for Insist, it may be disproved like any other witness,
1 Bos & Pul. 49. 10 Mass. Rep. 39. Phil. 74. 78 to 80. 7 Mass. R. 297.

But when the confession of a party is then to be proved, all that
he said on the subject at the same time is to be given in
evidence but the mere confession by itself. But he is not
entitled to the benefit of any qualifying declarⁿ he may have
made at a diff^t time for this would be making evidence
for himself. 1 East. 462. 3 Campb. 215. 1 ib. 439. Phil. 79. 80.
Vir. at. "ev." a. b. 23.

And a party is never allowed to intro-
duce his own declarⁿ as evidence for himself except when
they constitute a part of the res gesta, or matter of fact
or transaction in issue, or when they accompany an
act of his own. Thus the terms of a parol contract,
may be explained & better understood from the various declarⁿ used
at the time by the parties, which enter into the very essence
of the contract.

Suppose the question is on which obligⁿ a ten-
der was made, the debtor may prove that he said at the time,
that he intended the money to apply on obligⁿ No 1. But if
he made no such declarⁿ at the time, a subseq^t declarⁿ that he in-
tended it should apply on that obligⁿ will not avail him.

So when one said with sword or cane in hand, if it were not ap-
p^roach time I would strike, so in action for battery. Def^t may give in
evidence to mitigate damages that he said at the time, it was

an accident, when this doctrine accompanied the act. but not if it
was subsequent. 6 East. 188. 1 Johns. 59. 1 Mod. 3. Esp. D. 312.
1 McHy. 373. 5. 7. 1 Hawk. 133.

The same rule applies as well to crim-
inal as to civil cases. The doctrine accompanying the act may
be proved, but will not always avail. Thus a man may com-
mit robbery but only the language of a beggar. Other lan-
guage he is at liberty to prove on the trial but the acts of vio-
lence accompanying the language may prevent the jury
from confiding in his sincerity, as, inserting a weapon
which occasions fear.

And there is a case in which what a
party or his wife has sworn in a former trial may be pro-
ved in his own favour. Thus in an action for a malicious
prosecution the Def^t may prove what he or his wife sworn on the origi-
nal trial, i.e. of the facts, prosecuted by him. This rule is
founded in public policy & private justice. most prosecutions are
commenced on the information of an individual. there might
be no other witness. If this evidence were not admitted
the present Def^t would be wholly unprotected. the prosecu-
tion of course of course should be ruined, because they
did not believe him. His deposition is now admitted & the cred-
ibility of it is submitted to the jury with the other evidence
6 Mod. 216. Bull. et al. D. 14. Esp. D. 534. 536.

So also the confession
out of court of the party really interested, tho not a party on
record, may be given in evidence agt the party who represents
him. Thus if a suit is brought on a bond ^{made} conditioned to pay money
to B. the confession of B out of court that the money had been
paid to him is as good as if it were made by A who is the man

conduct pipe. instrument or agent of B. 11 East. 578. 589. 1 Wils. 257.
3 Campb. 465. 10 East. 395.

And what has been opened by a stranger in
a party's presence ag^t his interest but contradicted by him is evidence
for it may constitute, as the case may be, into a silent confession. this
is not a confession but it is good evidence to go to the jury who
can make what use of it they please. Peck. 16. Ser 127. 129.

But the dec^y of a stranger or even of the party's serv^t, child or
wife in the party's absence are regularly not evidence ag^t him
as in case of a contract or tort. the wife should confess in her husband's
absence that he was guilty or indebted. 2 Stra. 1094. 6 T. Rep. 680
as of a wife's acknowledgment of having rec^d. wages earned by
herself. 2 Stra. 1094. Willer. 577.

So in an act^y by husb^d & wife in
behalf of the wife as Ex^t. her confession after marriage will
not be admitted for during the coverture her right to act as
ex^t. is suspended. 6 T. Rep. 688

Join Grim. bar exam. no dec^y of
the wife will affect the husband. the injury is his & the action
is for his benefit & she cannot do away his right by her con-
fession. Willer 577.

To say, Mr. G. Ser how-
ever Phil. 203.4. when it is said. Dec^y of wife at time of elopement
as to the reason of her eloping. as that she fled from immediate
fear of pers^o violence would be admissible, the dec^y respecting
a collateral matter that happened at another time would not
be. And in a case where defence was Plff's connivance, &
violence was rec^d. on part of plff of the wife's dec^y as to her inten-
tion & purpose in going. the question being in effect whether the
husb^d knew she was about to elope or whether he believed her in-

tribution was as she represented. 6 East. 193. 3 Esp. N.R. 6. 276. Selw.
N.R. 27.

So in an action to which an aggregate corporation is a party
the confession of an individual member of the corporation
is no evidence & cannot be proved, for an individual in
such case are not regarded at all, the corporation is the only
object of the law. Phil. 74 n. 3 Day. 493 not being made in
the exercise of any corporate duty.

But in transactions usually
regulated by wives, if the wife makes a contract with the husband
authority, his dectⁿ may be proved as evidence against him.
Thus when an actⁿ was brought for nursing a child evidence of
the wife's dectⁿ that a contract was made to pay a certain
weekly sum was admitted. The words of this rule appear
to be quite good and rather too much so, for I know of
no other instance of the kind. Sta. 527. 1 Esp. 60. 142
Esp. Dig. 721.

The dectⁿ or admissions of a serv^t or agent, if
made at the time of transacting his principal's business &
in relation to it are evidence ag^t him, they are regarded as
part of the res gestae. Thus the delivery of a deed to a third
person by a serv^t as an escrow, the dectⁿ of the serv^t at
the time of delivery are good evidence. So if a serv^t saw
defects of an article at the time of purchase,
his dectⁿ might be evidence ag^t the master in an actⁿ
for damages. 3 T. Rep. 455. 2 Mch. 620. 626. Phil. 71-4
10 Vy. 127.

But the acknowledgments of a servant
or agent made after the transaction to which it relates is
no evidence ag^t the principal, for they do not form part

of the *negotia*. but stand like all other *honesty* evidence
7 T. Rep. 665. 668. Phil. 75. 77. 8 5 E. 6. 74. 135. 2 id. 511. 2 Campb.
555. 10 Vy. 127. 127. 127.

The same distinction obtains as to the dict.
of an interpreter between two parties and for the same reason.
11 St. Tr. 171. Phil. 77. he is the accredited agent of the parties.

The dict. of a bankrupt as to his motion for absconding. if made
at the time of absconding. an evidence in an action brought by
the assignees, to prove the act of bankruptcy. for they are a
part of the *negotia*. 5 T. Rep. 512.

But to the general rule that the
dict. of third persons can not evidence unless made at the
time; there is an exception, viz in case of an insurance
affected by the husband on the life of his wife. here the subject
dict. of the wife as to her ill state of health at the time
of the policy effected is evidence against the husband. this
is a case *res* *generis* standing on its own peculiar rea-
sons. for frequently the existence & even the nature of bodily
complaints cannot be known but by the dict. of the subject
of them. 6 East. 188. 402. Phil. 181.

Upon the same
principles in respect to either civil or criminal for a battery or
personal violence of any kind. the dict. of the party injured
respecting the bodily pain occasioned by it. whether made at
the time of the act or not. if made during the suffering are
admissible evidence. & this even in an action brought by the party
himself. for it ascertains what the most skilful recognize
not so the rule appears indispensable and if it be provided
that they were made for the purpose of being given in evidence

on the trial they are admissible - & the jury are to judge of their
credibility. 1 Root. 80. Sec. 130

When a party to a suit represents
or stands in the place of another person, the confession of
the latter an evidence agt. such rep^t. Ex. confessions of
Tutor an evidence agt. Ex^m - of an ancestor agt. his
heir, when suing or sued as heir Sec. 128. For as the confessions of
Tutor so would have been evidence agt. himself, if living,
they ought to be such agt. his representatives.

So also in an
action agt. a Sheriff for an escape on mesne process the confession
of the escape that he owed the Plaintiff such a debt is evidence
agt. the Sheriff, (when can ordinarily be no need of such evi-
dence in case of final process) For you will observe that
in an act. agt. Sheriff Plaintiff must prove that the escape
owed him. & he should not be deprived of his evidence
for this purpose by the wrong act of the Sheriff. 4 T. Rep.
436. Perk. Ca. 65

The rule is the same when an action is bro't
agt. Sheriff by Plaintiff in a process for a false return. Thus claims
as in agt. Sheriff returns non est in return, by which Sheriff
is deprived of his action, an act. lies agt. the Sheriff, & the question
is has Plaintiff sustained any damage - to prove in suchness
Sheriff's confessions are admitted altho he is no party to the suit
Perk. Ca. 65. 1 Esp. Dig. 152. 4 T. Rep 436.

And if in the case
of escape above stated, the escape were suffered by an under
Sheriff, his confession of the fact of escape would be evidence
agt. the Sheriff. 2 Ray. 190. Perk. 17. 18. Sec. 128. The reason
is that as to breaches of official duty the under Sheriff stands

in his place, and so far as respects civil liability may be said to represent him.

By the latest authorities however the evidence in this case is limited to confessions made at the time of the escape & not extended to those made after.
1 Campb. 391. n. 389. Park. 65. 10 Johns. 478. Phil. 76.

In an action by the assignees of a bankrupt, his acknowledgment before the acts of bankruptcy that he was indebted to the petitioning creditor, is good evidence in support of the commission, since his confession would have been good evidence to obtain the commission, & the assignees represent him. 1 Esp. 65. 168 Park. R. 65.

Upon the same principle, in a scire facias against a garnisher, he may prove a debt of the absconding debtor that garnisher owed him nothing. Foreign attachment is regulated in Eng. by custom & in the various U.S. by Stat.
Sw. 128.

So when a party to a suit claims a property by virtue of another title, the debt of the latter, as to the title are evidence against the party in recovery, for by his debt he is his self.
Sw. 129.

It is a general rule that when there are several debtors to a creditor the debt of one will be evidence against himself only, & not against his co-debtors, for one man cannot confess the rights of another.
Keyl. 18. D. & P. 243. 1 McElroy. 40. 269.

Thus in an action against one of two joint & several obligors, the confession of the other is not admissible to prove the execution of the contract or instrument - his confession will not prove the transaction out of which the liability arises. Kirk. 62. 174. 203.

But there is an exception to this rule in the case of partners in trade, if one is sued alone for a company debt & he does not dispute the action by a plea of non proinder in abatement, but suffers the action to go down to trial on the merits, the confession of the other partner tho not a party on record may be given in evidence the partnership having previously been proved. for each copartner is the agent for both & the act of either is the act of both of course the acknowledgment of either operates agt. both. *Prak. Ca. 16. 203. Chit. B. 209. Gibb. v. 51. Phil. 72. 3. 11 East. 589. 1 Esp. Ca. 169. n.*

And this rule has been carried so far as to allow the acknowledgment of one partner, tho not sued himself, to be given in evidence agt. the other, tho it was made after the dissolution of the partnership. *Phil. 73. 1 Taunton. 104. Contra 3 Johns 536.*

This I think is carrying the rule very far. the ground taken to be that, even after the dissolution of the joint partnership, as to all previous contracts the partnership still remains.

Tho the confession of one of two joint & several obligors, not being partners, is not evidence in an action agt. the other to prove the contract, yet the contract being established, such confession may be proved agt. the other to take the case out of the stat. or for any other purpose except to prove the execution of the note &c. For in this case, they are quasi hoc partners. besides in legal effect ~~the~~ confession is not strictly a deed, but a fact or act that has the effect of a new promise or a ratification of the old one, this I take to be the principle. *3 Day. 309. Long. 629. or 652. Whitcomb & Whiting Prak. Ca. 15. 203. Phil. 72. 3. 6 Johns. 267.*

This rule however does not hold of prosecutions for crimes or torts & it is not in terms predicable of either. The confession of one does not prove the other guilty, if it were admitted it would be permitting one to subject another for his own wrong. & therefore it is wholly inadmissible.

But here it is to be particularly noted, that in the case of an illegal combination, the combination being proved, the death of one made at the time of doing the illegal act, as to the motives of doing it, are evidence agt. himself & the others also, as in case of a riot, when the combinⁿ is established an intention or concert of place is established & a death made at the time is part of the res gesta. it is the view of all the declared by one & will be evidence agt. all unless the others oppose it at the time.

But a death made afterwards is not evidence agt. any except the maker. 6 T. Rep. 527. Phil. 73.6

If one of two Def^s in an actⁿ suffers a default & the other pleads to issue, the deth of the former may be proved on the trial of the issue for the purpose of showing the amount of damages, for the verdict ascertainment the damages agt. both, the default is a mere confession of guilt. If both are subjected there can be but one apportionment of damages. so that this is the only way in which Def^s can avail himself of the confession even agt. the confessor himself. Hart. 18. 2 Hawk 604. 7. 1 Mcq. 42. 361. Phil. 71. 81. Peck. 19. 2 Sw. 390.

And it now seems to be settled, that proof of Def^s confession uncorroborated by any other evidence whatever, may warrant the jury in finding him guilty even of a capital offence. Slime secus. 1 Mcq. 512/3.

Port. C. L. 243. Lach. C. C. 319. Sw. 137.

But a confession out of court elicited by torture or violence of any kind, or by threats or induced by promises of pardon or favour is not admissible in any case, for this would be putting the prisoner at the mercy of the instant, designing & artful. 2 Hale. P. C. 280. 2 Hawk. 204. 211. 1 Mety. 42-4 Lach. 122. 126 248. (Hylk. (contra) 18. overruled)

And hence a confession made by a prisoner out of court in expectation of being admitted as a witness for the King or public is not admissible evidence. To allow such evidence would be exposing him to extreme danger, they might lie to avoid the danger of a trial. Indeed the humanity of the law will not allow evidence to be admitted in such cases, which has been procured by promises, flattery or violence. Lach. 636.

On the other hand, the discovery of a material fact resulting from a confession thus made is good evidence, altho the confession & discovery were obtained by fraud, flattery or violence so that the confession itself could not be admitted. Thus if one charged with theft is induced by fear or flattery to confess his guilt & tell where the stolen goods are, if they should be found there, the discovery & consequent finding would be good and admissible evidence against him. 1 Mety. 47. 8. Peak 20 Lach. b. b. 299. 301.

I have observed to you that the confessions of a party may always be proved against himself, but there is a distinction to be observed between the confession of a party

and an offer of a compromise made by him. for this can now be given in evidence agt. him. for if a man is threatened with a suit for \$100, he perhaps would prefer paying \$20. than costs & expenses even if he were certain of recovering. he would offer it to avoid the hazard & trouble of a suit. La Mansfield says "a man must be permitted to buy his peace without prejudice to his cause." such offer is no evidence of liability. it is irrelevant. 1 Esp. Ca. 143. Ch. Bills. 208. B. et O. 236. Phil. 78.9. Prk 18. Sw. 126.

But the confession of a material fact during a treaty for a compromise is evidence agt. the party making it. Prk. 19. 1 Esp. Ca. 143. 2 ib. 475. 3 ib. 113. Prk. Ca. 5 Bull. N.O. 236

In some cases the acts of a party amount to an admission which is conclusive upon him, which he cannot retract nor controvert. Thus if one acts as innkeeper & is sued as proprietor as such he cannot deny that he was lawfully an innkeeper, for as he holds himself out in that character, to avail himself of the benefit of it, he cannot avoid its duties. otherwise individuals might be defrauded. So whatever character a man may assume 3 T. Rep. 635. ^{sup} Prk. 20. Sw. 129.

So if a man lives with a woman as his wife, when she is not so, she may bind him by contracts as a lawful wife may do. His acts amounting to an admission that she is his lawful wife. Prk. 20 2 Esp. Ca. 637. Sw. 129. "Hus & W."

So also in some cases if one professes to hold another as holding a particular situation & thereby derives a benefit to himself, he is not permitted afterwards to deny the facts. E.g. a man gives bonds of B the in-

concurrent. In an action for use & occupation, A was not allowed
to dispute B's title by proof of Simony. Den. 21. 5 T. Rep. 44. 3 ib.
632. 1 ib. 761. n. 2 et. Rep. 260.

All evidence may be considered as direct or pre-
sumption. Direct evidence goes immediately to prove the point
in issue.

Presumption in law, is an inference from certain facts
proved or admitted, of the existence of some other fact or facts.
presumption evidence then is that which conduces to prove
consequently, the particular facts by directly proving an-
other.

Thus if one a charge of theft one says he saw it clear-
ly & distinctly take the goods of B. this is direct evidence, but
if, that he saw it in possession of the goods that were stolen
it is presumptive & throws the onus on A. but does not
decide the issue, i.e. it may be rebutted. 1 Mass. Rep. 6.
Tw. 136. Pr. 21. every presumption of fact is always liable
to be disproved. Pr. 21.

Long undisturbed enjoyment or possession of property
right a property affords a presumption that it had a legal founda-
tion, and in such cases even the existence of records may be
presumed. The fact to be presumed is submitted under the direc-
tion of the court to the jury. This rule of evidence is of great
consequence. As Mansfield said that the court will direct
the jury to presume any thing & every thing for quitting the
title enjoyed for a great length of time, even tho' they cannot
believe that there really was any legal commencement of
possession. Thus in a question as to the right to collect post duties

a charter from the Crown was presumed by duration of the b.
& affirmed in B.R. We have had very strong cases in
law. In this country, a deed & record was presumed to
have existed & been lost. tho the records before & after the
time were in existence. In et. H. 60 the whole course of
proceedings are an intestate estate in a court of probate
was presumed. 12 Co. 5. Cowp. 103. 216. 217. 1 T. Rep. 399. Esp.
636. 3 Wms. Rep. 399. Peck. 21. 2. Bush & Bradley et. H. 60.
Blanchard & Warner elidd. Co.

This rule is founded in prin-
ciple than for its object the granting of title under propⁿ of
long standing. There is a case where the court directed the
jury to presume a courtⁿ record to have been suff^d. by a
tenant in tail. 3 T. Rep. 159. 2 Burr. 1065. So when an
joint tenant had been in exclusive propⁿ. for 36 y^s the
court directed the jury to presume an actual ouster
that the stat. might run. Cowp. 217.

And not only
ordinary facts, but deeds, records, notaries, advertisements
in newspapers or any other species of facts that can be
mentioned which is necessary to consummate a titling
be presumed. 3 T. Rep. Wms. 399.

And it seems that an un-
disturbed propⁿ or enjoyment for 20 y^s in Eng. or 15 in law,
may in analogy to the Stat of Lim. be left to the jury as
a ground of presumption. to hold an (adverse) in case for
obstructing rights of 20 y^s enjoyment. Esp. 636.

On the same
principles when a bond has lain dormant for 20 y^s without
pay^t. of principal or int. & without suit. the court will direct the

the law to presume pay^t. unless indeed the obligee can acct.
for the delay by absence disability, or deft. previous insolvency
or by proof of a recognition of the debt within the time.

And now the rule is laid down in more indefinite language
for 18 or 20 y^{rs}. In. bon[?] the rule cannot apply for we
have a stat. of Lim. applying to bonds. 1 Bl. Rep. 532
3 P. Wm. 395. 7. 8 Mod. 278. Bur. 434. 1963. 1 T. Rep. 270. Peck
24. Sw. 138. Comp. 216. This lapse of time throwing
the onus on Dff. Sta. 826. L. Kay 1370.

And now more.
evidence by the obligee if made before the time when
the presumption might have arisen, is good evidence of such
pay^t. It is for good evidence to rebut the presumption
of full pay^t. Pea. 24. 2 Sta. 826. L. Kay. 1370. 3 B. & C.
P. 6. 538. It is if made after that time. Peck 25.
Sta. 827.

If a cred^r. entitled to a debt payable by in-
stallments, gives a rec^t. for one installment, it furnishes
strong presumption that the preceding installments
have been paid. - So is the rule as to pay^t. of
rent. Peck 24. 3 Bl. 371. Comp. 103. 1 T. Rep. 399.

And more length of time short of the period prescribed by the stat.
of limitations (in cases to wh. the stat. extends) is not a suff^t.
ground for presuming the extinguishment of a right.
Comp. 214. Peck 24. n.

Evidence is of two kinds. I. Written. II. Unwritten or parol.

Written evidence is divided into three kinds. 1st Records. 2^d Public writings or documents which are not records. 3^d Private writings. Pea. 26. Sw. 60. 1.

A Record is a written memorial of the laws of the State or Statute, or a precedent of justice according to the laws & customs of the State. Hence the written memorials of the acts of the Legislature & of judges & judicial proceedings of courts of record are denominated records, as the Parliament Rolls &c. Gill. 7. 48. Bull. N.P. 235. 221. Peak. 52. Sw. 2.

A record can never be contradicted, for in the language of Ld. Coke "it imports absolute & uncontrollable verity". This rule is founded in the great solemnity of such writings. Bull. N.P. 221. Peak. 27.

The rule does not mean that nothing introduced in the form of a record can be contradicted. For if a record is made erroneous by any unauthorized alteration, that fact may be proved by parol evidence it may be proved to be a forgery & so no record.

On the other hand evidence is now admitted to prove that an alteration by proper authority & to make the record correct was improperly made. 1 Bl. Rep. 662. 2 Bun. 2267. Pea. 28. m. 1 Sta. 210

And doubtless evidence may be admitted to prove that a writing importing to be a record is in truth a forgery. This is not denying or falsifying.

sitting in words, but saying that it is a rule.

Further, note

withstanding the gen^l rule, the petition, dates of writs issued in vacation may be contradicted at the time term of issuing them proved or / and, when it becomes necessary for the purposes of justice. Thus writs issued in vacation are usually taken as at the preceding term, now if since that time & before the return of the writ, a tender has been made or the state of limitations barred the action. Defendant may prove the time the writ actually did issue to take advantage of that circumstance. it being a gen^l rule that all fictions of law may be contradicted for such purposes 2 Burr. 980. 3 ib. 1241. Peck. 27.

As records are thus the precursors or memorial, of the law to which all persons have a right of access. they cannot be removed from place to place for private purposes.

Since their existence & contents are provable by copies these are the best secondary evidence. The right and public property & public convenience requires that they should be kept stationary in a public office. Gilb. 8. B. c. v. P. 225. 6. Peck. 28.

And on this subject it is a gen^l rule that when any writing of a public nature, which if produced itself would be evidence of itself, that is, in-dubio, is evidence, a copy of it duly proved is evidence also 3 Sa. 11. 154. Doug. 572. 1 McCy. 355. Peck. 91.

But on the other hand a copy of a copy is no evidence at all, for the first copy, not being produced is not sworn to & the second cannot at most be of

negotiorum credit than the first. LaRoz. 154. 1 Mcm. 356. 3 Salk. 154.

The public acts of the Legislature require no proof of any kind for being the law of the land they are supposed to be known by all persons in the community & especially by the judges who are bound to notice them ex officio. The printed statute book is not evidence, but is used merely to aid the memory of those who read & those who hear. As to the acts of foreign Legislatures the rule is different. Gilb. 10. B. & P. 222. 5. Pea. 267. Sw. 2.

But private stats. not being a branch of the gen^l law of the land are not supposed to be known to the public nor to the courts. hence they are to be proved as facts like other records which relate to private rights i.e. by copy. They are to be proved as much as deeds or wills. Gilb. 12. 13. Dy. 239. 10 Mod. 126. B. & P. 222. Peak. 27.

And the printed stat. book is no evidence of private stats. printed in it. (see volume contra by Rob. J. Parker. Gilb. 13 Salk. 272 since denied to be law) for it is no more than a private unauthenticated copy, not sanctioned by oath or any official sanction. Peak. 27. B. & P. 225.

But if the Legislature declares that a statute in its nature private, shall be deemed public, the stat. book is sufficient evidence of it: or rather there is no need of proof, the judges being bound to notice it officially as a gen^l law. Peak. 27. n.

It would appear that as records are not unrevocable, they must be proved by copies. Pea. 28. 96. Sw. 2. The copies of the records of the Legislature are to be certified by the Sec^y of State, as in case of a private stat. The records of the courts of law are by the

proper officer of those courts, as by the clerk or Prothonotary, if there is one, if not by the Judge himself. In both cases the copy is to be authenticated by the seal of the court if there be one. (Our justices of peace having no clk. nor seal, sign the certificate or record themselves, without seal) And courts are presumed to know the seals of the Legislatures: & of the ~~several~~ courts of all the states in the Union, however the fact may be. See Ex. 7. 7 H. U. S. 153. For analogous rules in Eng. Gilb. 19. 1 Sid. 146. 7. Dea. 30. 31.

Copies of records under seal are called exemplifications, and it is a rule of b. 9. that seals of public credit are full evidence in & of themselves without oath or other authentication. If they were not courts would have to resort to a lower species of evidence, a certificate of justice speaks only by its record & the genuineness of that record can appear only by the seal, which is the established organ or symbol by which one court certifies to another. 10 Mod. 125. b. Gilb. 19. Plow. 411. a. Hard. 118. 19. 1 Sid. 146

As to the manner of certifying records from one of the States to another, the Stat of the U. S. directs, that if an exemplification be attested by a clerk of a court, it must be evidence in another state, be accompanied with a certificate of the chief or presiding justice, the govt. secy. of state or Chancellor, that the attestation is in due form and made by the proper officer 7 H. U. S. 153

By the same law copies of records or office books as they are called, kept in an office not appertaining to a court of justice, as Town or County records of lands &c. are to be attested by the keeper of the office, under seal of office if

then be one and certified by the presiding judge of the court of the County, or by the Governor, Chancellor or Seal of State, that the attestation is in due form by the proper officer.

Copies of the records of courts of justice are of four kinds. (usually divided into three) 1st Exemplifications under the great seal. (Kept by the Clerk in Eng^d) Under our law copies are not exemplified by the great seal. 2^d Exemplifications under the seal of the court to which the record belongs. 3^d Officer copies, i. e. copies certified by the attestation of an officer appointed for that purpose, but not under seal & 4th Sworn copies, these are copies compared with the orig^l by a witness sworn to in court by him. Gilb. 21. 2. Peak. 28. 9. B. N. P. 228

Copies under the great seal are themselves deemed records, not copies, from their great solemnity, and thus in Eng are the only admissible evidence of the existence of a record upon plea of nullity record pleaded in a court of equal or inferior jurisdiction to the one whose record is in question, in a court of superior jurisdiction the record & proceedings may be removed by certiorari, for other purposes other copies may be suff^t. Plow. 411. a. Gilb. 14. 19. Hard. 118. Peak. 28. 9. Sw. 2.

Exemplifications under the great seal, as to records of courts, being unknown here, those certified by the seal of the courts are the highest evidence in our courts, and are regularly the only admissible evidence on an issue of nullity record. This rule applies however, you will perceive only to those cases in which the existence of a record is in question in another court than that to which the record belongs. Sw. 2. B. N. P. 226. Pra. 29. 30.

For if a record of the same court in which the issue of
nul tili record is joined, is denied, the court will inspect the
orig^l. so there is no need of a copy. the evidence is in the hands
of the court. Hence the replication affirming the existence
of the record makes no protest of non replication, but
prays the court to inspect the record. Peak. 29.

And issue of
nul tili record always concludes to the court, for it involves
matter of law which the jury are incapable to determine.
Lewins. Pl. App^l.

But when a record is only matter of induec-
ment to an action or defence, nul tili &c. cannot be pleaded
to it, for matter of inducement is not issuable. B. & P. 230.
Gillb. 26. 1 Sid. 145. b. Lawes 22. Sec. 2. 4 Bac. 68. 81.

In such
cases the issue being tried by the jury, the evidence of the ex-
istence of the record is to be submitted to them, & a sworn
copy as well as an exemplification is admissible. Bull. 230
Peak. 29. Sec. 2. Gillb. 26. 2 East. 473.

In debate on judg^t nul tili &c.
is the great issue & it puts the existence of the record directly
in question. no evidence is allowed but an exemplification un-
der the great seal in Eng. or the record itself, produced for in-
spection, or an exemplⁿ under the seal of that court whose
record is in question; in U.S.

Suppose def^t in retrial pleads
guilt issue, which in Eng is "not guilty, in bar, no wrong
no surprise" and claims under a judg^t of court, here
the record is mere matter of inducement for the
issue is the great of the action, and a sworn copy is here

good evidence.

But a copy of a sworn copy is no evidence at all either to the Jury or Courts. however its may be authenticated for the reasons before given. *Peak. 29.*

Office copies are grantable only by an officer appointed by law for that purpose. - A copy thus granted is in itself evidence, & is, of course, recd without any collateral proof. as by a Town Clerk. no proof that he certified it, need. *Gillb. 23. Plow. 110 B. N. P. 229. Peak. 31 to 3.*

But a copy certified by an off^r not authorized by the law to certify it, is of no credit. That is it does not from itself of course is no evidence unless examined & sworn to when it becomes a sworn copy *Gillb. 23. 4. 6. B. N. P. 229.*

But the answer is in genl. provable only by a copy of some kind, yet if it can be clearly proved that a record once existing has been destroyed or lost and that without the fault of the party claiming under it, inferior evidence of its contents is admissible especially when the record is only in document. for to produce a copy is impossible therefore even parol evidence is admissible. *Gillb. 22. 1 Vent. 257. 1 Mod. 117. Salk 285. B. N. P. 228. Peak. 29. Gaud. 323.*

And in such cases a copy if shown to be the not unimpaired nor sworn to be true is admissible, it being proved by some kind of evidence to be substantially a copy of the contents of a record. This is allowed from the necessity of the case. *ib. ante. Phil. 291*

But this inferior species of evidence is regularly admitted in those cases only in which ancient records or

those of long standing are lost *Peck. 30. Gilb. 22. 3. 1 Mod. 117.*

For if a recent record is lost & its contents can be ascertained, the court will permit one to be made *de novo. 2 Burr 722. 1 Mod. 117. Gilb. 22. 3. Peck. 30. Phil. 292. Gains. 496.*

Generally, an exemplification or copy of a record must, to be admissible evidence be of the whole & not of any part exclusively. For a detached part may have a construction different quite different from the general import of the whole. *Gilb. 17. 23. and the rule is the same as to copies of other instruments. as deeds, wills &c. 3 Inst. 173. B. N. P. 227. 8. Phil. 290.*

For *Ag^t* whom a Record in a civil suit is evidence. In *quod* a verdict or judgment in a civil suit is evidence only as between the parties to it & their privies. thus a verdict between A & B is no evidence between A & C. *Peck. 368. 64 B. N. P. 232. Carth. 225. 7 T. Rep. 112. 1 McMy. 624. Ray? 730. Hard. 262. Phil. 222.*

Priority as recognised by the law exists in four cases. 1st Priority in blood. as between an ancestor & him at law. *1 Inst. 352. 2 East. 383.* 2^d Priority in estate as between feoffor & feoffee. lessor & lessee. j^r & tenants. - *Cohears. 11 Inst. 169. Diff^r remainder run by the same end. - Particulars trust & remain as man &c. 1 Inst. 352. B. N. P. 232. Gilb. 81. 10 Co. 92 3 Co. 23. Peck. 29. 32. 1 Inst. 267.*

3^d Priority in law as between L^d & Tenant sometimes called priority in tenure. *4 Co. 240. L^d & Ten^t by the curtesy - Husband & trust in dower. 1 Inst. 352.*

3 East. 353.

Itth Privy in representation or between Testator
& Ex^r - Intestate & adm^r. 4 Co. 123. 4.

Thus if there were a record
between A & B as containing title. B should sell to C. this
record would be good evidence in a dispute between A
& C respecting the land. So if B had leased to C. or B held
as heir to B. - or as tenant in dower or by the courtesy. &c.

In all these cases the record has the same force & effect as it
would have had in a subsequent action between the
orig^l parties.

The next inquiry is as to the effect of such record
when so admitted as evidence.

It is an established rule, that
a judgment of a court having competent jurisdiction, directly on
the question, is conclusive evidence for and against the parties
and their privies. Thus if A sues B in debt on bond & B defeats
him - and afterwards A sues ag^t B may plead the former judgment
in bar. So if A's Ex^r sues the second time. 6 Co. 7. 2 Bl. R. 827.
Civ. E. 668. 2 Vent. 169. 1 Lev. 235. Amb. 761. Peak. 34 to 6. 4 Benc. 116.
Sw. 9. Phil. 223.

Hence if final judgment has been given in a suit, it can
be impeached or called in question only "in due course of law"
as by writ of error, appeal, bill in Ch^l directly praying relief
or in Com. by a petition for a new trial which is a manner
unknown to Ch^l. for by Ch^l. ^{trial} review is granted after final judgment
a final judgment then cannot be impeached in any collateral
way, i.e. by any orig^l action. Peak. 36. Sw. 9. 10. 1 Day. 170.

The reason of this latter rule is, that a final judgment deciding any

legal right must determine the controversy or litigation would be endless.

The rule is the same as to decrees in Ch. and awards of arbitrators, for they are conclusive until set aside in due course of law. 1 Day. 130. 3 ib. 30. Peak. 68. 75.

If then judgt. has been given for Def^t on a dem^r or a plea to the action or in any way so that the right in question is decided, the Plff can not while that judgt. remains in force, maintain any similar or concurrent action for the same cause. Thus if first chattels are forcibly taken, trespass & trover are concurrent actions, & if they are sold indeb. aft^r for the ann^l sale, is concurrent with them. now if final judgt. determining Plff's right be rendered on either of these actions it is an absolute bar to his maintaining another action of the same kind or either of the other actions, for the same thing. 3 Wils. 304. 2 40. 2 Bl. Rep. 827. 3 East. 346. 352. 3. 6 Co. 7. 6 Mod. 20. Peak. 34. 6. Lew. 11. 2 Bac. 116.

But this rule does not hold if the first action was misconceived or failed for the want of an essential allegation supplied in the second for in such case the right claimed in the second neither was nor could be decided in the first, the grounds disclosed in the two being diff^t. Of course the Plff may traverse the averment which Def^t in pleading the record of the former judgt. must make that the cause of action in the second suit is the same as was alleged in the first. as if Plff should omit to allege conversion in trover, or malice in slander. 2 Vent. 169. 2 Bac. 116. 17. Cro. E. 667. 8. Ray. 472. 2 Mod. 318. 3 ib. 1. 2. Peak. 37. Lew. 11.

And on the other hand a judgment for Plaintiff for the recovery of a debt or other demand is conclusive of the existence of that debt or demand as against Plaintiff & his assigns. And the rule holds whether the recovery is by verdict, upon confession or demurrer, or by default. *Pratt* 34.5. *Sw.* 9. 7 *T. Rep.* 269. *B. & P.* 232. 1 *Dary.* 170.

Since the Plaintiff cannot recover back the money paid under the judgment, the he can show by the clearest evidence that he paid it before judgment or that it was never due. And this is not all he can not in such a case maintain an action for pound against the Plaintiff, in obtaining the first judgment, for this would be collaterally impeaching that judgment. 1 *Dary.* 130. 3 *ib.* 30. *Pratt* 35. 68. 75. 2 *St.* 361. 414. 7 *T. Rep.* 269. *Sw.* 9. 10. *Phil.* 226. 9 *John.* 232.

The same rule holds of decrees in Chancery & awards of arbitrators. *Pratt* 68. 75. 1 *Dary.* 130. 3 *ib.* 30.

There is one case (*Moss & Co. v. Farland*, 2 *Bur.* 1009,) that seems to impeach this rule but I do not think it does that action was brought to recover back money paid under the judgment of a court of conscience & maintained on the ground that that court could not take cognisance of a sufficient legal defence pleaded by Plaintiff, so that Plaintiff in that action could not conscientiously retain the money paid. - The case is however much shaken. *Phil.* 225.

And it has been determined that if a party on being sued, pays the money or demand, the denying it to be due, he cannot afterwards recover it back, because it is said the payment was made in a course of legal proceedings. 1 *Esp.* 60. 84. 279. *Pratt* 35.

Saying or introducing

this rule on the ground that Def^r is estopped by his own act. but
there is no judg^t in the case and I doubt the correctness
of the rule for it is not founded in principle.

On the other
hand a Plff having recovered judg^t for a part of his demand
when he attempted to prove & recover the whole he is precluded
from maintaining another action to recover the residue
for it is substantially a judg^t in favour of Def^r as to that
part which Plff failed to recover.

If however he did
not attempt to prove the part as an item, altho his
demand (which by the way is immaterial as to amount)
was large enough to cover the whole, he may bring
another action to recover the remainder or other item
for the question as to that has now been raised. it was never
in issue. 6 T. R. 607. Peak, 35.6. Phil. 235.

I observed yesterday that a final
judg^t in an action is conclusive so as to bar another similar or
concurrent action for the same cause.

But in the application
of this rule there is this diversity to be noted between real &
personal actions. All persⁿ actions are of equal degree of
course a bar in one persⁿ action is a bar by way of estoppel to
any other personal action for the same cause or thing. Thus
if Tresp. & Trov be concurrent & T brings Tresp. ag^t B & it is
depraved. then brings Trov for the same thing, the former
judg^t had in bar by Def^r stops him. 6 Co. 7. Phil. 235

In real actions on the other hand there are various degrees, some
being of a higher nature & rank than others. Thus a judg^t

in a *poss.* action is no bar to a real one the relating to the same subject. Thus if A sue B in *trasp.* given clause *perj.* & B recover *judg.* this is no bar to a *subseq.* real action to recover the same land. for the rights in question in the two actions are not the same.

Nor is a *judg.* in one real action, a bar to another real actⁿ of a higher nature for the same cause for the same reason. Suppose A deputed in *quodammodo*, it is no bar to his bringing a *subseq.* real action for his *reco.* in this action is perfectly consistent with B's *reco.* in the former action. 3 East. 258. 4

But in every species of action the final *judg.* so far as it respects the immediate subject matter in issue is conclusive by way of bar to any future litigation. 3 East. 357

And if any precise fact is directly put in issue & found as that A. & B. seized in a *poss.* action as *trasp.* it is conclusive as to that fact so as to prevent its being disputed afterwards between the same parties even in a real action. 3 East. 346. 354. 5. 8. 366. Ver. 12.

As this distinction is intricate to those who are not acquainted with the rules of evidence I will recapitulate. A final *judg.* in a *poss.* action as *trasp.* is no bar to a real action between the same parties respecting the same land. because one relates to the *prop.* the other to the *freehold*.

But if any precise fact is directly put in issue in the *poss.* action, the record is conclusive evidence in any *subseq.* action as to that fact. Ver. 236. 7.

To make a record in a *form* suit

conclusive when any matter of right or point is disputed it must appear from the record, that that point or right was directly put in issue in the former suit. Thus when a Pleff having been barred in a suit upon a contract or for a trespass it does appear that the same point was in issue & decided the first judg^t is conclusive by way of estoppel. But I suspect this must appear of record, for other evidence cannot be admitted to show that a particular matter not in issue upon the record, came in question or was taken into considⁿ by the Jury. Phil. 236. 1 Esp. R. 43. 2 Johns. R. 24.

It is always how-
ever admissible to show by extraneous proof that the subject in Controversy was the same or different. Thus if A sues B in trespass for taking his horse & is defeated, if he afterwards sues him in trespass for taking a horse, it would be tantamount to prove that the horse is the same one for which the former action of trespass was brought or for Pleff to prove that it is not the same horse. This must necessarily be so provided for it cannot appear upon the record, one description may answer for twenty horses.

It must appear then from the record whether a given point or question of right was in issue, but whether it related to the same or a diff^t subject or article must appear either on the record or by extrinsic evidence.

^{on} must then to the case of the horse if it is admitted or proved that it is the same horse, the former judg^t is a conclusive bar to the latter action. the record of it shewing the question disputed (the title) to be the same.

I observed that to make a record conclusive it must appear, from the face of it, that the same point or right comes directly in issue in the former suit. But in a suit for performing work unskilfully, the record of a former action in which Def^t had recovered of Pl^{ff}. a compensation for the labour done, is not merely not conclusive it is no evidence at all.

The reason is that the quest. ifue having been the plea, it does not appear that the unskilfulness of performance was used as a defence in the former action, altho it might have been so used. *Sir. 12. 1 Esp. 43. v John. 24*

A former judgment between the same parties is conclusive as well when the point decided by it comes afterwards incidentally in question, as when it forms the ground of action or defence in a subsequent suit.

Thus in an action on a policy of insurance with warranty of neutrality, a sentence of the courts of admiralty condemning the vessel &c as enemy's property is conclusive that she was not neutral, tho the question of neutrality arose incidentally on the trial of the actⁿ on the policy. *B. N. P. 244. 8 T. Rep. 196. 4 B. 4. 2 East. 268. 473. 7 T. Rep. 523. Doug. 554. Phil. 250. 3 B. & P. 201.*

In Eng the sentence of Ec. etc. on the subject of marriage & legitimacy is evidence against third persons in those cases where those courts have no decisive power of determination. tho the question of marriage or legitimacy comes incidentally in question, as when Pl^{ff} in questⁿ claims by descent. *Park. 77. Sir. 13.*

But on the other hand a prior judgment is no evidence of any matter that

came in question collaterally in the prior action, to make it evidence it must have come directly in issue. Hob. 53. B. N. P. 233. 244.

Thus in a suit between A & B. B produces C as a witness. C proves him to be legally infamous & his testimony is rejected so that B is defeated. This judg^t is no evidence of the fact that C is legally infamous; that point arose collaterally & does not appear upon the record.

And the judg^t of a court upon a point only incidentally cognisable by it, is no evidence in another action between the same parties. Thus when a question of admiralty jurisdiction arises in a C. L. Court, as of contraband or neutrality in an action on a policy of insurance, the judg^t is no evidence in a subsequent action. It does not appear upon the record, the judg^t issue being supposed to be the plea, & the question arose incidentally. If however it were specially pleaded & distinctly found it would come under a former rule.

The rule is the same as to any matter merely inferable by argument from the former judg^t. Thus A sues B on a contract. B gives infamy in evidence under the judg^t issue. It is not competent for A to show a former record ag^t B on a similar contract to rebut his evidence.

And a prior judg^t given upon the judg^t issue is, in no case whatever conclusive between the parties, unless the cause of action is the same in both cases even tho' the title out of which the cause of action arises is the same.

Thus A sues B for a given insurance, if A has actually recovered ag^t B in a former action for the same insurance, the way

continuance of the nuisance is a repetition of the injury, the former judg^t is not evidence. The reason is that the cause of action is not the same, the title which is the foundation of it may be, so in a second action for the disturbance of the same right or franchise. Peak. 37. 8. B. N. P. 232. 3 East. 365.

The same rule holds in relation to the Eng action of ejectment the lease & estate being fictitious, the identity of the parties & cause of action cannot appear upon the record, Rem. Eg. 12. Peak 37. 8.

But in those three latter cases as well as all similar ones the verdict in the first action is evidence in the second, tho not conclusive. B. N. P. 232. Gilt. 29. 30. 35. Sta. 308. 1151. South. 79. 181.

The judg^t then is not conclusive unless the cause of action is the same as well as the title, but the verdict may be given in evidence when the cause of action is diff^t, tho it would not be conclusive.

If however the title or any fact decisive of the right had been distinctly put in issue & found in the former suit the verdict might be pleaded by way of estoppel & would be conclusive. 3 East. 346. 352. 5. 358. 366.

You perceive then that a verdict may sometimes be evidence tho not conclusive when the judg^t would have evidence at all. And there is a great difference between judg^t & verdict, as to their nature office & effect. By neglecting to observe this difference a deal of confusion has been introduced into this part of the law of evidence.

A prior judg^t upon a point or title afterwards put in question is a sentence of law deciding the right

A verdict is mere evidence of a matter of fact, tho' when pleaded
able & pleaded by way of stoppage it will be conclusive.

A judge

when evidence at all is conclusive, a verdict is not necessarily so.

The office of a verdict whether pleaded or given in evidence
under the genl. issue is to prove some matter of fact. But
the office of a judge is not to ascertain facts, but to show the
right determined by it upon the facts as ascertained by ver-
dict or otherwise. Peake 37. 3 East. 358. to 365.

Thus A brings from
ag^t B for a watch and is defeated. He then brings a second ag^t
for a watch, it being proved or admitted to be the same
watch, the former judge is conclusive of the right & therefore
conclusive ag^t the present action.

On the other hand if in
an act. of trespass B. Def^t pleads a specific fact, as that A. S.
direct seized in fee & devised to him, by which that fact is put
directly in issue & it is found, the verdict is conclusive
as to that fact in any subsequent action. Since stop a party
from trying it over again. but what right follows as a
consequence of this fact is left for the decision of the court.
A prior judge then when evidence at all is conclusive between
the parties & their privies as to the point or title decided by it
whereas a verdict may be prima facie evidence only it being
conclusive of the fact but not of the right of the parties. Ashb.
756. 761. 1 Lev. 235. 1 Day. 170. Pea. 34. 5. 7.

Since a prior judgment
in a few exempt cases can never be made use of in any
way except the cause of action is in both suits the same. for as
the prior judge it is to have any effect is to be conclusive it surely

ought to be no evidence except when the cause of action is the same.

But a verdict the conclusion when pleaded by way of stopple, may in many cases be given in evidence when not conclusive, tho this cannot be done unless the point in question came directly in issue in the former suit. B. & P. 292. 3 East. 365. Gilb. 29. 35. Peck 37.

In the cases however to which this rule applies, i.e. when a verdict may be evidence tho not conclusive, are those in which the cause of action or right or demand in question is not the same in the two cases, tho depending on the same title or same state of facts. for if the cause were the same the verdict would be conclusive & then would be named of the verdict as evidence.

Thus if two pieces of land are held by one & the same title as by deed or devise, a verdict in ejectment or dispossess as to one piece may be given in evidence in a subsequent action between the parties for the other piece, for the title is the same tho the subject matter is diff^t. If the subject matter or cause of action were the same the verdict would be useless for the verdict would be conclusive. Gilb. 29. 30. B. & P. 232. Stra. 306. 1151. Gauth. 79. 181. 2 Mod. 142. 5 ib. 386.

A prior verdict in a suit for a nuisance or disturbance may be given in evidence in another suit, for the continuance of the same nuisance or a repetition of the same disturbance. It is prima facie evidence for the cause of action is diff^t tho the right or title out of which the claim arises is the same 3 East. 365. Peck. 37. 8.

I observed yesterday that a verdict in one action might be given in evidence in another between the same parties & then prius. On this subject I have further to

above that a verdict in a prior action of ejectment for a given piece of land, may be given in evidence in a subsequent action of ejectment for the same land between the same parties as if it was B in the name of a fictitious person as C. and is defeated by a verdict in the name of B another fictitious person the verdict in the first case is evidence in the present action. The judgment in that case is not conclusive and not evidence, because the identity of the nominal parties & the causes of action do not appear upon the record which is necessary to constitute an estoppel. But the court will take notice of the real parties for the purpose of admitting the verdict as evidence. Gill. 35. B. & F. D. 232. Peck. 40.

It is stated in Swifts evidence p. 18. that verdicts can only be given in evidence as to those facts that are specially found. i.e. as to those facts only which are found on a special issue. This cannot be law for in the cases before mentioned of ejectment, nuisance & disturbance the verdict was supposed to be on the general issue. The true rule is that a verdict cannot be placed in bar by way of estoppel unless found upon a special issue, but a verdict on the general issue may be evidence between the same parties tho' it is not conclusive.

I have thus far treated of the effects of judgments & verdicts when admitted in evidence. We are next to consider.

For & against whom a record is evidence.

In general the record in a former civil suit is no evidence in a subsequent one as to the facts or rights which it imports to be

tablish, except as between those who are parties to it & their privies. Thus a record of a suit between A & B is no evidence as between B & C.

The principle is that third persons are not in general to be bound or in any way affected by a judgment between other persons, altho the cause of action in the two cases arises out of the same act. because the latter had no opportunity to cross-examine witnesses, to controvert any of the facts, to bring a writ for an intervening error, nor to set it aside for motion for any irregularity, being a stranger to the record. Gilb. 29. 32. 33. Dougl. 212. LaRay. 1292. 3 Mod. 142. B. & P. 232. 3. 242. Phil. 222. 228.

And as the benefit of the rule ought to be mutual, third persons cannot in general take advantage of the record of a suit between other parties even as against one of those parties. It is laid down by Ch. Baron. Gilb. "who else can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary." It is therefore a sufficient objection when a verdict or judgment is offered in evidence either for or against the former party that the transactions in the former suit are as to third persons res inter alios acta. Gilb. 34. 5. B. & P. 232. 3 Mod. 141. And 172. Phil. 230. 1. 3

There is indeed an exception as to the generality of the rule that the benefit to be derived from the record as evidence must be mutual, but the state of facts in which they are founded is so complex that I must refer you to the books. Plak. 38. 9. Gilb. 33. 5. LaRay. 730. B. & P. 232.

But the former

rule that a record is no evidence except as between the parties & their privies is not universal. Thus where one uses for his own

brings the name of another as party to a suit, the verdict will be evidence for or ag^t the former or the party uses the other name the not conclusive. as in *York v. York* by an issue in the name of *James v. James* as *J. Doe & Richd. Roe*, the first need ag^t *J. D.* will not stop *R. R.* because the parties are diff^t as well as the issues, but these parties being parties the court will notice the real Diff- so as to admit the verdict in evidence. *B. v. P. 232. Gibb 35. Peck 40.* and in this case whatever the first verdict might be either party may adduce it in the second action.

So again if *trover* be brought ag^t *A* who justifies as the servant of *J. D.* the verdict in this case is evidence, tho not conclusive in a subseq^t action brought by some *Diff* ag^t *B* who ^{also} justifies as the serv^t of *J. D.* either for or against him, for *J. D.* is virtually, tho not nominally the party on record, & because he is not nominally on record the evidence is not conclusive, would not be even if it were on a *spec. issue* *Peck 40. Doug. 517.*

There is one other exception to the gen^l rule when the point in dispute is a question of public right, in such cases a verdict finding or negating the right in a given action between certain parties will be evidence in a subseq^t action between diff^t parties.

Thus *C* & *S* vs *B* in *trover* who defends on the ground of a public right of way & verdict is found ag^t *B*. he afterwards sues *C* who defends in the same manner, the former verdict will be evidence ag^t *C*. as it might have been ag^t *C* if it had been given ag^t him in the first action. *See also it is not conclusive. Peck. R. 156 219. Carth. 181. 1 East. 355.*

Suppose a city or other corporⁿ brings an actⁿ ag^t it claiming a certain toll by virtue of a custom or prescription, the verdict found in this case will be evidence in a subsequent action ag^t it.

The probable ground of the rule is, that the right in question is public & every individual in community is interested in it on acct. of the possible conflict or prejudice that may accrue to him from it.

The sentences of courts whose proceedings are in rem as the courts of admiralty are not conclusive ag^t for all persons who are whether nominally parties or not. Proceedings are said to be in rem when the sentence acts immediately on the subject of condemnation. As a ship libelled if she is condemned the law takes possⁿ of & disposes of her.

Suppose it is possⁿ of a ship in a foreign port. She is libelled & condemned & then if B belonging to another country appears & claims her, the former judg^t concludes him & all mankind.

The reason is that all mankind may become parties to such proceedings & for that reason are regarded as potentially parties. It is not a suit ag^t the ship or any other person, the notice given to appear is to all mankind. These proceedings are therefore not considered as in rem alios acta. 8 T. Rep. 196. 434. 7 ib. 523. 681 5 ib. 255. 2 East. 268. 2 Bl. R. 977. 1174.

Whenever therefore any matter determined by such a court afterwards comes incidentally in question, for if at all it must, that sentence is conclusive. As if in an action upon a policy, a question of navigability should arise, a sentence in the adm^t court condemning the ship is conclusive as to the judg^t was between other parties, in it once.

The rule is the same as to witnesses of courts having jurisdiction of the probate of wills. I admit for the same reason viz. that all persons may be parties. 1 Sw. 235. 3 T. Rep. 125. Rask. 78. n. 1 Day. 170. 2 id. 312. And even when one was indicted for forging a will, he was acquitted at once on producing a probate of the will under the seal of the ordinary. Stra. 481. 713.

So also if A brings an act. as Exr. to B. & left. pleads that A never was Exr. to B. the probate of a will in which A is named as Exr. is conclusive & B cannot prove that the will was forged. it was declared good by competent authority. 1 Sw. 235.

Then usual proceedings in rem in bringing for to all the world, any one may appear & claim as heir at law if willing to pay the costs of failure. the proceedings are not in the nature of a suit between A & B. appⁿ being made for probate. any one may declare himself devisee or legatee under a latter will & defeat the appⁿ.

You will find a case in Chace. C. C. 2 Mery. that on the first impression would seem to in. back the case above of forging the will. But that case stands good the probate in such case is conclusive & no witness of the facts of forgery can be admitted. The case in Chace was diff^t the forger was indicted before the intended testator was dead. in this case a probate was produced but it has no effect because the Ecc. acts without authority. Both proceedings as executors non prode. 2 of course void. 4. C. C. 103. 2 Mery. 429. That case turned upon this distinction on 3 T. Rep. 125.

There is another case in 2 Mery. 430 but there the probate was obtained by fraud in the proceedings which rendered it void 2 Mery. 430. 457. 461.

In q^u also the sentence of judg^t of an ecclesiastical court in matrimonial causes as of divorces, a marriage ~~is~~ conclusive of the fact of marriage &c. when it afterwards is incidentally questioned in another court & ag^t all persons. Thus if a claim is set up at law a sentence or judg^t of such a court declaring him illegitimate is conclusive of that fact. *Adm.* 756. 762. 3. 460. 29. 7 il. 41. *Barth.* 225. *Str.* 961.

Again in an action for criminal conversation with Pl^{ff}'s wife a prior judg^t of an Ecc. b^t annulling his marriage with his reputed wife is conclusive evidence for the Def^t *Str.* 460. *Peck.* 77. n. *Adm.* 756. 763.

So also if an action is brought against a man as husband to recover a debt due from his wife while sole, a prior sentence of an Ecc. c^t declaring the marriage null & void is conclusive ag^t the Pl^{ff}, as it shows the Def^t was never married to this woman & as the debt was contracted before marriage he could not be subjected in consequence of giving her credit as his wife. 11 *H. Tr.* 235. *Peck.* 78. n.

You perceive that here the record is conclusive ag^t a person who is not a party to it the reason of the rule as to third persons I take to be that the sentence is in the nature of a proceeding in rem & therefore should conclude all persons altho they are not nor could have been parties. A proceeding in rem is for this purpose to be considered in the nature of a common appearance, which is evidence as a deed is between other parties.

Such a sentence however is not conclusive upon an indictment for bigamy. Thus if A is indicted for bigamy for having married B. living his

former wife B. a sentence of the Ecc. Ct. declaring his marriage with C good & lawful or his marriage with B void is no evidence, in other words he may be convicted notwithstanding such sentence. 11 H. Tr. 261. Pra. 78.

It is difficult to reconcile this with the decision in the case of forgery above alluded to. In support of the last as to the marriage it is said that the Ecc. Ct. has not cognizance of crimes. That in the case of forgery the King could have made himself a party, but that he could not in the case of the marriage question.

And in these cases individuals who were strangers to the proceedings may show that the sentence establishing the marriage as annulling it was obtained by fraud ^{& collusion} between the parties, thus being intrinsic facts which vitiate the most solemn proceedings. Being a party when the court, a stranger may see that it is fraudulent because being a stranger to the record he could not come in & reverse it. When there is collusion there is no case in which one of the parties can avoid the sentence if one of them was depaupered & the court likewise the other party can vacate the sentence only by app^l to some court that rendered it or one of equal jurisdiction. Anst. 76 V. 3. 2 Ky. 246. 11 H. Tr. 262.

you will observe that I am now treating of the exceptions to the general rule that a record is not evidence except between those who are parties & their privies.

Further when one person has been compelled by suit to pay money for another, in an action for a reimbursement he may give in evidence the record of the former suit ag^t himself

not for the purpose of proving the allegations that were made & proved in the former trial, or that Deft. justly owes him for the money advanced, or that that money was really due from him. But that such a recovery was actually made ag^t him to such an amount & as the case may be that he p^d. it on exp^t which is "produces undoubted satisfaction." The record thus far is a part of the *res gesta*, the fact of pay^t must be proved. State Dept. may deny that he owed the debt that Deft. was his security &c. Deft. is compelled to prove by other testimony all other facts necessary in his case except that he has paid.

So also when a Deft. has been subjected for the official acts & defaults of his Under Shff. when he sues the U. Shff. he may show the former record for the purpose of proving that he has been subjected to such an amount or for the misconduct of his Deft. but not to prove Deft.'s guilt or that Deft. is his Deft. or that he was acted on such. That the Shff. was subjected is part of the *res gesta* & must be proved.

So when a master has been subjected by the misconduct of the Serv^t. In an action by the master ag^t the serv^t. the former record is evidence of precisely the same facts.

Again in an actⁿ by an endorser of a Bill who has been subjected, ag^t the acceptor. Deft. may give the record of the former suit to show that he has been obliged to pay so much, but that Deft. accepted the bill & is liable to Deft. must appear from other testimony. Peab. 238

In an actⁿ on a covenant of warranty in a deed of conveyance the Deft. may give in evidence the record of a prior suit by which he was

victed, not for the purpose that the victor had higher title, this must be made out by other evidence, but to show that he has been victed for without actual victio he can never recover on the count of warranty. Gilb. 28. Yelv. 22. 1 Roll. 396.

And if the warrantor was vouched in in the prior suit the record is conclusive ag^t him of the whole case. This is when the Def^t in the first suit the covenant on being sued, gives notice to his grantor by writ of voucher of the pendency of the suit & gives him an opportunity to appear & defend the title he conveyed. In such case whether he appears or not the record is conclusive ag^t him "loest Broken".

So in an actⁿ upon the warranty of title to a chattel as a horse, the Plff may give in evidence the record of the suit ag^t himself in which the value of the horse was recovered of him, for the purpose of showing that he has lost the horse, for without proving that he proves no damage. But not to prove that the seller had no title or that the person who recovered of Plff had. 1 Johns. 517. Lev. 15.

So also a record of a former recovery & satisfaction obtained by the Plff ag^t a stranger for the thing or matter claimed is evidence for the Def^t to prove the fact that such prior recovery & satisfⁿ has been had. As if an endorsee should sue his endorser after he had recovered of the acceptor, the Def^t may plead in bar the former recovery & satisfaction or give it in evidence as the case may be.

So if A & B were bound jointly & severally in a bond & C the obligee s^d sue A & alone & recover of him then sue B. B might give

the record of the suit ag^t A & satisfactⁿ under it in evidence to show that D^{ff} has been paid.

So also if a trespass had been committed by A & B the verdict & judgment ag^t A is evidence in favour of B. & in this case you will observe that it is suff^t to show that judgment has been recovered without proving satisfactⁿ whereas in contracts it is no bar unless there has been satisfaction. "Court Broken" Cro. Jac. 73. Phil. 32.

In those cases also in which the party to a suit derives his title from a judgment in a former action between himself & a stranger. He may give the prior record in evidence. As in ejectment between A & B either party may show a title by judgment & give in evidence a record of the suit by which it was set off to him. Sec. 14.

Now again the record is of no inter alios acta but the ground on which it is introduced is merely to show that the D^{ff} &c has all the title that J. S. had, and is evidence as a deed is a common assurance, it is in the nature of a conveyance. The record is by no means evidence that the title was in J. S. but that the D^{ff} has all J. S.'s title. — Thus far as to verdicts in civil cases

Whether a verdict in a prior criminal case can be used as evidence of the facts proved by it in a subsequent civil suit is a question not settled even at the present day.

One example will explain the whole subject. Thus, a committed a battery upon B. was indicted & convicted. B now sues him in a civil action for the injury & offers the record of the former prosecution & conviction as evidence of D^{ff}'s guilt.

this question remains unsettled as you may see. Peck. Co. 41 to 48. 146. 8. n
Phil. 87. 8. 4 Burr. 2225. 4 East. 577 n. 581. 1 Campb. 9. 151. Salt. 283.
1 Sid. 325. Gill. 30 to 32. B. & P. 245. 1 Taunt. 520.

If doubts had not existed in
the minds of some eminent lawyers I can say I could hardly
consider it a question. It appears to me extremely clear that
such evidence cannot be admitted. Why should a verdict
& judgment in a criminal case be evidence any more than a
record of a civil suit. The case comes precisely within the gen.
rule the more strictly of no inter alios acta. and no man can
dream of admitting the record of a former civil action for a tort
or evidence in a subsequent action for the same tort. Even of contracts.
The exceptions to this rule are founded in sound common sense
where a record is allowed to be evidence between other parties, it
goes to prove the fact of a former recovery only & not to establish
those facts which are found by the verdict & judgment. But in
this case the record is offered to show not merely that the def.
has been once sentenced, but that he is actually guilty of the
misdemeanor charged. I think it cannot be admitted & I think
the weight of authorities incline to this opinion.

But the record of a prior civil or criminal case is admissible
to show that such a suit has existed. the bitum diff. sen-
tence. As on an indictment for perjury, the record of the case in which
the perjury is said to have been committed not only may but
must be given in evidence or produced to show that the suit
has in the debt was tried. but not to prove the facts found by
the verdict & judgment B. & P. 243. Peck. 48.

But a verdict
in a former suit is in no case evidence of the facts found by it

until final judgment has been entered upon it. Of course when it is proper to give the verdict in evidence the party produces only the former part of the record without the judgment it is not admissible the judgment being indispensable to show that the verdict stands good & has not been set aside by motion in arrest, for a new trial or in some other way. *Howe* 161. *B. & A. P.* 243. *Phil.* 292.

"It is evidence of the fact found by it" is an emphatical part of the rule, for there is no necessity for a record of the judgment if the only object for which a verdict is introduced is to show that such a suit has been agitated, for the verdict is evidence of that fact whether it remains or is nullified? ^{2d} Now then that such an issue has been tried, the proper i.e. that part of the record which precedes the judgment, alone is sufficient evidence. *B. & A. P.* 243. *Peck* 50.

and a verdict upon

an issue out of *Chancery* with a decree in *Chancery* in pursuance of it may be also evidence of the facts found by it, but not without the decree is produced, because the decree of such a court is substantially the same thing, as a judgment in a court of law & the same reasoning will apply to both. *B. & A. P.* 234. *Phil.* 292. *Peck* 50.

There are some rules of evidence necessary for us to attend to which are not to be found in the books of *C. & L.* I refer to the manners of proving the records of our State in the courts of Justice in another.

Then I would observe that the acts and proceedings of Congress and the records of the *U. S.* courts, are receivable in our State precisely as domestic acts & are, of course the rules already laid down apply to them, *Howe* 161.

Go also to view the constitution of U.S. according to the construction given it in the Con. courts, a judge in one state is of the same solemnity in another as a domestic judge. And there have been decisions to this effect in Penn. both in the state & Fed. Court. In ex. y. such judge was formerly holden to be only prima facie evidence of what they imported to prove or establish, the courts were then obliged to try the whole case over again. The later decisions however agree with those of Conn. & Penn. Con. U.S. Art. 4. Sec. 1. Sec. 6. 7. 2 Dall. 302. See also contra. Mrs. Mable. Dep. 401. 1 Crim. 460. 1 Johns. Rep. 426. 5 ib. 37. 1 Dall. 188. 219. 261. For recent decisions in ex. y. 8 Johns 86. 173.

These observations do not apply to the mode of proving but to the effect of such judge's when proved.

An exemplification attested by the clerk of a court in one state must to be evidence in another state, be accompanied with a certificate of the clerk or presiding justice of the court, the Gov. Secy. of State or Chan. that the attestation is in due form & by the proper off. (vide sup) 7 H. R. 153.

As to the mode of proving legislative acts of other states. By Stat in Con it is enacted that the printed state books transmitted by the legislatures & executives of other states to the Gov. & deposited by him with the Secy. of State may be exemplified by him & they will then be evidence. 21 Con. 457. Sec. 6. 7. There is I think a corresponding provision in most of the neighbouring states. This course is adopted to avoid the inconvenience of sending to the extremity of the Union for certified copies of a whole state, for of a part will not answer. The method is for the executives to interchange authoritative copies of the statute & when the Secy. receives the book he exemplifies the whole statute at once.

Of Public writings not Records. These are the most to be considered as a species of written evidence,

Public writings not records partake of the nature of records in as much as they are kept in a fixed place as documents or memorials, by public authority for the use of the public. B. & P. 234. Pratk. 51. Gill. 47.

These public writings are also evidence in themselves & are equally in point of solemnity the highest species of evidence records only excepted. Gill. 47.

They are in genl. proved as records & authentic and viz. by copies examined & sworn to as true. B. & P. 234. 5. Gill. 47. 56. 7. Cowp. 17. 590. 2 Burr. 1189. Pratk. 51. 3. 5.

These rules relate to the manner of proving the documents of a state within that state as to the mode of proving the acts ~~of~~ of a neighbouring (see last page ante)

These documents cannot be called records because they are not memorials of the law nor precedents of justice according to the laws & usages of the State. hence the evidence of high authority they do not come strictly within the denomination of records B. & P. 295. Gill. 48.

Of this sort of public writings there are several kinds, 1st Journals of the Legislature as distinguished from their acts which are strictly records: these are much the history of the proceedings of that body and may be proved by copy examined & sworn to by a witness. Pratk. 53.

But a mere resolution passed by either house of the Legislature, as a foundation for other proceedings is no evidence of

the fact counted upon or resolved as that a treasonable combin^{tion} exists, or that such publication is libellous & during a process is no evidence that such combinat^{ion} does exist or that such writing is libellous. 4 H. Tr. 39. Peak 53.

2^dly the memorials of proceedings in a court of Eq^t the writings of a public nature are not records: and that is one & a suff^t reason why a writ of error never lies from the decree of that Ct. to an appeal lies to the House of Lords. But why are they not records? the answer is that they are not precedents of justice according to the strict laws & usages of the State, but memorials of determinations secundum equum & bonum it was formerly supposed that a Ct. of Eq^t was bound to the rigor of no law or precedent, but this was never correct. Gilt. 48 Peak 50. B. & P. 235.

But a bill in Ch^{ancery} is evidence only for the purpose of proving the facts that such a bill was filed or such other facts as may be proved by mere reputation or hearsay as of pedigree as to this then they are on a par with monumental inscriptions family bibles &c. So that what is alleged in a bill is not evidence ag^t him in a subsequent suit, being regarded merely as the statement of counsel to obtain an answer. 15. E. 2. 2 & 3. 159. Peak 12. 54. Formerly it was supposed that the facts alleged in a bill were evidence ag^t the party making them, without qualification. but it is not so now. 1 Sid. 220. B. & P. 235.

But an answer in Ch^{ancery} is evidence ag^t the party making it of the facts alleged in it as well as of the facts of such an answer having been made, this is evidence of a solemn oath being under oath, whereas the allega-

tions in a bill are not under oath which constitutes the difference between them. 2 Vint. 194. 288. Gill. 50. B. & L. 237.

Thence
even as evidence is required however as nothing more than a confession
& of course is admissible only when a confession by the same party in
a diff^{er}ent form would be. Hence a confession by a guardian for an in-
fant will not evidence agst the infant in a subsequent suit. A verbal
confession of the guardian could not be proved, neither can his answer,
for he has no power to confess away the rights of the infant. So of the
answer of a trustee &c. 2 Vint. 72. 3 Mod. 259. Gauth. 79. Bull 287.
Peak. 54. 3 B. & M. 235.

But an answer by one of two partners in a suit
Eg^t. agst himself by A. is evidence agst the other partner in a suit
agst him by B. as such. The reason I suppose to be that the acts
and acknowledgments like the acts of one partner bind the whole. Thus
when one partner pleads the Stat of Limitations. Plff was admitted
to prove a confession by another partner that took the case out of
the statute. Whitecomb & White Long. 629. Peak. Com. 16. 203. Peak.
Eor. 55. Ech. B. 209.

So also a voluntary affidavit by one person
jointly interested with another, has been admitted in an action
against them both, it being a confession by a party in interest
in the action. - Gill. 51. 56. 7. Peak 55.

But in regard to an answer it is to be observed as a general rule that a copy of the whole answer
not of any particular part only is to be exhibited. For the whole
for obvious reasons must be taken together. So of a judgment &c. the
whole must be exemplified or in some way proved. The rule is the
same as to all written evidence whatever, the whole or a copy of
the whole must be produced. as if a fact is to be proved by a deed.

the whole and must be produced, however prolix or however insulated the fact may be. 5 Mod. 10. Peake 55. Bull 227. 237. 2 Vent 194. 288.

As the party against whom the answer is introduced as evidence in a subsequent suit is concluded by the admissions in it against himself, so on the other hand the averments in it in his own favour are evidence for him. And this shows a decisive reason why the whole of the answer must be produced. So in proving any acknowledgment all that was said at the time must appear, whether it qualifies or extends, and the whole must go to the Jury for them to examine. — it ant. Gibb. 50. That the party's allegations in his own favour are not conclusive Peake 56.7. he may however have them read to the Jury. & the other party may falsify them if he can.

There is however an instance in which an extract or a part of an answer may be read in evidence without the residue that is when you wish to show that a person who is offered as a witness is intrusted in the events of this subsequent suit. — for otherwise his testimony might be introduced when the other party did not wish it & no man can in the first instance introduce his own declaration in his own favour, but if an attempt to prove the confessions of an other the other is entitled to have the whole proved. 3 A. P. 288. Peake w. 57.

An affidavit sworn by one of the parties in a former suit is evidence in a subsequent suit is similar evidence to an answer in 6 A. P. & is provable like it Peake 57. 8. by copy.

But a voluntary affidavit cannot be thus proved not being a writing of a public nature. By a voluntary affidavit is meant one made extrajudicially.

as if the vendor of a chattel stated under oath that he had the title or that it was unincumbered. This constitutes a part of the proceedings in a court of justice - is not upon the record, and it must be proved like any other private document. Gill. 51. 5. 6. 1 Vern 58. 413. LaRay. 311. 734. 893. 936. Bul. N. D. 238.

A deposition used in a former suit is always evidence in a subsequent suit between the same parties, provided the deponent is dead or out of the reach of process a note to be found, for if the witness might be produced his deposition given before is not the best evidence, an affidavit is in writing taken by the party a deposition is given by a witness in writing. Gill. 60. 61 Peak. 58. 9. Barnard. H. B. (not 648) 348. Salk 278. 281. 286. 1 Alk 245. B. N. P. 239. 1 Merly. 14. 283. 285. 7.

It has been said in and that a deposition in a former suit between the same parties is evidence when the deponent being duly subpoenaed falls sick by the way, but this is questionable & I think not law, it might be substantial reason to postpone the trial until he recovers, but not for the introduction of secondary evidence unless it were objected to by the other party. 1 Mod. 283. 4. B. N. P. 239. Stra. 920. Gill. 60. Peak 59th.

But the deposition of a witness like any other declaration of his either written or verbal may be introduced to invalidate the evidence he may give in court viva voce when he is alive & present. It is not evidence in chief of the facts stated in it, but bears upon his credibility. Peak. 58. 9.

Whether the deposition

of a witness, who at the time of giving it is disinterested, but who afterwards by operation of law becomes interested & a party can be made in evidence, is a question wh. has divided the opinions of eminent men. Thus a subscribing witness to a bond testifies to the ex^t of it. the obligor dies, having appointed the witness his Ex^r who now brings an action on the bond. Peak. 58.9. Stra. 109. Eq. 62. ab. Holcroft & Smith. 224. Phil. 268. Pre Cha. 123. Bul. N.P. 286. Esp. D. 756 Salk. 286. 2 Varr. 699. 2 V. 42. 2 Atk. 615. 1 P. W. 288. q. 1 Mod. 2 Stra. 920. Bul. N.P. 242. 242.

It has been some time since I examined these cases, but from my present recollection of them they do apparently tho not really contradict each other. The Chs decisions have regularly been in favour of the depositions & according to my understanding of the cases the rule is the same at law. The depositions which were excluded in the cases reported by Strange 101. & Salk 286 were on interrogatories de bene epe which cannot be read in evidence unless the contingency on which they were taken has happened & as this contingency was in both cases the death of the witness (as I conceive), they could not be admitted while the party who made them was living. The depositions offered in the Chs cases, on the other hand, were for the most part taken pendente lite & admitted to support a bill of revivor. — On principle this affords no ground. The only objection offered is interest. Now the rule of Ch. is that to exclude a witness he must be proved interested at the time of examination; and there is an abundance of cases in which witnesses interested in the event of the suit are restored to competency by a deprivation of interest. Ex. dfd's bail restored by substitution, for he then loses his liability & may give testimony for dfd. Now invert the circumstances of this case & it is precisely the same with that of the depositions. In the one the witness is interested before he testifies — in the other he becomes interested after. See under Pea. Ev. 166. Phil. 27. 48.

Depositions de bene spe, that is as it is taken provisionally to substantiate the testimony of witnesses are admissible evidence when taken under the direction of a J. of the Ct. They are not taken pending any particular suit, but by way way of caution in three cases. 1st When the witness is about leaving the country 2^d when they reside abroad or 3^d when they are in apparent danger of death from old age or infirmity. These are obtained by filing a bill in Ch. of the other party interested. They are not evidence however unless the contingency in contemplation of wh. they were taken has happened, or perhaps if the party who was absent has returned. B. & P. 240. Hard. 315. 308. 383. Salt. 191. Kinder. Ch. 32.

But depositions like verdicts are only evidence as between the parties to the prior suit or controversy in wh. they were taken or their privies. Other persons had no opportunity to cross examine. B. & P. 239. Gilt. 61. 1 ed. 445. 3 ib. 415. 501. 2. 524. 3 Bac. 314.

For the purpose of introducing any interlocutory proceeding in a court of Ch. proof of the prior stage of the suit in that court is necessary, thus to introduce an answer a bill must be proved for an answer without a bill to authorize or compel it would be void in law. Gilt. 55. 6 Peak Ev. 66.

But however the bill has been lost or destroyed by time or accident, it may be proved by secondary evidence even by parol & this rule applies to all written inst. even records. — 5 mod. 211. Peak 29. 67. 1 Vent. 257. B. & P. 228. Gilt. 22. 2 Keb. 31.

a J. drawn in Ch. is evidence whenever a J. of law would be under similar circumstances, for it is the same thing.

Effect is governed by the same rules (quanti) it is evidence of
of the facts sought that it imports to establish. Peck 38. 40. 62. 68. B
at V. P. 232. Gilb. 29. 32. 36. Doug. 222.

The proceedings in courts of
of Admiralty and in Eng in the Ecclesiastical courts are evidence of the
same nature & authority as those in bts of Ch. in the probate of
wills, sentence in a matrimonial cause or prize can in these re-
spective courts, these are public writings of a solemnity next to
that of records. Gilb. 67. 3 T.R. 125. 41b. 258. Ray? 405. 1 S.D. 359.

And then even the sentence or decree is as conclusive as a judgment
at b. l. tho it is not called a record. It is allowed however to
show that the seal of the court, or other proceedings are forged
for this does not contradict the sentence or decree but shows
that none exists. Peck 69. 1 S.D. 359. Ray? 405. These
proceedings also are provable by copies as all other public writings
are. Gilb. 71. 3 T.R. 154. Doug. 572.

The Judgment of a foreign
court is also evidence here of the right it imports to establish
- the fact that it properly to find. Peck 70. as that it is
indubitable to B.

But as to the Judgment of foreign municipal courts
there is this distinction to be observed? that if the party claim-
ing the benefit of it applies to our court to enforce it, it is but his
mere foreign evidence of his claim, the other party may therefore deny
it, and the court can inquire what are the laws of the country
where the judgment was rendered whether it was rendered according
to them. for the party voluntarily submits it to the wisdom and
judgment of our courts. But if it is used by way of defence to an
act prosecuted for the same cause, it is as conclusive as a judgment.

of our own courts for the proceeding have acts as to ~~the~~ as in mention
in being forced to answer the Indg^t. 2 H Bl. 410 Doug. 1. Peck 70. Gris.
wold vs Pitcairn. 2 Conn. Rep.

1st Foreign Indg^t may be proved first
by an exemplification under the great seal of the state or King-
dom in wh. it was rendered which is supposed to be known to
the courts of all nations. 9 Mod. 66. Peck 73^m Lu. Ex. 8.

2^d By a
sworn copy i.e. by a copy compared to the orig^l. & sworn to by a
witness in Court. 2 branch. 187. Phil. 301^m 5 East. 475.

3^d By the
attestation of the proper off^{rs} of the court with the seal of the
court annexed. but this seal you will observe is not supposed
to be known to the courts of all other states as the national seal is,
it must therefore be proved like any other fact. 3 East. 221.
Phil. 301. Gill. 20. Peck 72. 3.

4th The great seal being the
common medium of proof established among nations. & of the
guarantee of a seal offered as a seal of state the b^t. judges
ex officio it is not like the seal of B. B. to be left to the
jury.

Foreign statutes may also be proved by exemplif^{cs} under the
great seal or by sworn copies. 2 branch. 187. Lu. Ex. 9. as to
proving the statutes of neighboring states see ante. & H. Conn. 457. 8.

Unwritten foreign laws or customs cannot be proved by com-
mon, ordinary parcel evidence nor by copy under exempli-
fication. for they are supposed to be unwritten, but by the testimo-
ny of "respectable intelligent persons". wh. sum^o includes only
lawyers & judges i.e. professional men, tho it may comprehend
others. exhibit in several countries etc. 1 Johns 385. 394. 1 D. M. 331. Peck 73^m

In this country the usual practice of proving the common or unwritten laws of other states is by the depositions of propertied men, & I suppose the unsworn certificate of such men is the evidence. Thus in an *ag't* *Suff of Law. Co. in Penn.* I sent an certificate of lawyers to prove that counsel in *6th Ed.* collect their fees by *6th Ed.* this note being *Eng. 6th Ed.*

But the sentence of a foreign court of admiralty (as contra distinguished from the *6th Ed.*) as to all subjects of their jurisdiction, an conclusive as to all persons, of the rights or facts wh. they import to establish whether they are used to establish a right or a defence. The reason is that they decide from the law of nations, which is a part of the law of every civilized community, every where as well as there. *Park. Ins. 353. 8 T.R. 192. 230*

And if a foreign court of admiralty states the evidence on wh. it found against fact, no *6th Ed.* can enquire here whether that evidence was sufft. to establish that fact, the finding is conclusive in this case however it is conclusive evidence only of the fact found by way of conclusion, as, that the prop^t belonged to an enemy & not of the fact stated by way of evidence as the absence of a certain document. "*Insurance*" *Park. 71.*

And if a foreign court of admiralty passes sentence without specifying any cause, it is conclusive. *E.g.* an *Eng.* or *Fr.* *6th Ed.* concludes a ship as lawful prize it is conclusive that she is not unlawful tho not so stated. *Park. 417. Pa. 71.*

But if it appears from the facts & the conclusions, founded on them by the foreign *6th Ed.* that the condemnation was not for a breach of the law of nations but for a non compliance with some ar-

bitrary domestic or municipal regulation, the sentence is void &
so no evidence at all. 7 T.R. 533. 8 id. 434. 562. Peak. 71. 2. Park
215.

And no arbitrator has any effect whatever by way of
evidence or otherwise unless the court was regularly established
according to the law of nations. As when Bonaparte authorized
his consuls in Spain to hold such sittings within the jurisdiction
of another sovereign power. 8 T.R. 268. 2 East. 273.

Proceedings
in courts of law are provable by copy under the seal of the
court & that seal proves itself. i.e. is supposed known to all the
Peak. 72. 3.

For the same reason the seal of a foreign Notary Pub-
lic can supposed to be known to all the world his being an officer
established by the law of nations & not by Municipal Law. The rule
arises from the necessity of the case, the seal of the 6th B.R. is
not presumed to be known. 10 Mod. 66. 2 Roll. R. 346. Pea. 74.

It is hardly necessary to observe that the public seals of our courts
prove themselves, but the private seals of individuals
do not. Gilb. 20. 21. 1 Esp. R. 53. 3 T.R. 313. Peak 73. 4.

An award of arbitrators is as conclusive as a judgment of a court estab-
lished by law. Arbitrators indeed form a court created by the parties
but sanctioned by law. Willes 36. Peak. 75.

And though an arbitrator
cannot actually transfer real estate like a Court of Equity, yet he
can award a transfer and his award will be as conclusive in
Equity as a decree in Equity. The whole spirit of the rule then
blatantly laid down by Ryd & others is, that the award cannot

like a stream, not in sum & transfer the prop^{ty} co instant^{ly} but its cum & dec determine the title as absolutely. Peak. 75.
3 East. 15.

It has been a question how far a protest by a ship captⁿ in-
specting losses barrating de is evidence, it has been settled however
that it is not evidence in chief for any purpose, of the facts
stated in it, but it may be used for the purpose of invalida-
ting the testimony of the person who made it. 2 Esp. R. 490.
691. 1 Bay. 91. Marsh. Ins. 616.

In some cases executive docu-
ments are evidence. e.g. sworn copies of entries in the books
of the Executive offices of govt. as Set^t of Trans. &c. of the
several States or Idid. Sec. Ev. 22. 3. And the same rule
holds of the votes & the acts of corporations. as if the title
to Bank stock were disputed, the entry of transfer in the books
is evidence. 2 Melw. 475. Peak 90. 91. Stra. 93. 307. Doug. 593

The auth^y of the rule is merely this that those entries are provable by
copy & the copy is evidence, but a private writing as a letter, tho
belonging to a public body cannot regularly be proved by copy
the orig^l must be produced. Stra. 401. Peak. 91.

The direct^y of an in-
dividual corporation are not evidence for or ag^t the corpⁿ. as
of the credit or loss of a Bank. A corporation sh^d only be
proven, & not as they are recorded, individuals are not regarded
Sec. Ev. 23.

As to acts of State as they are entered, a gazette published
under the authority & sanction of govt^y is suff^t evidence.
as if one would avail himself of a Proclamation, private
papers however would not be. We have no papers under count

contract or such contract as the law notices. 5 T.R. 2436. B
N.P. 226. 2 Mer. 479. Peck 79. 5 T.R. 2436.

The books of a public prison are evidence to show the time of a prisoner's commitment or discharge, but not to prove the ground of commitment or discharge, that must be learnt from the record of the court. There are not facts for private papers to record, the other are. 2 Mer. 475. Peck 79. 3 B & P. 188. In the Log Book of a ship of war is evidence of the time a convoy sailed. 1 Esp. 427. Peck 79.

A gent's history (as Sturges) is evidence of such facts & events of a public nature as admit of no other proof but is no evidence of matters of a private nature, as a particular custom. 1 Ark. 281. 12 Mod. 85. 1 Vent. 149. 1 Kin. 14. B. N. P. 248. Peck 79-83.

Surveys & inquiries taken by authority of Govt. are evidence between individuals, as now is Doomsday book of boundaries. So surveys recorded by Surveyor Genl. of U.S. So surveys of ports & harbours taken by order of govt. Peck. 84. Hob. 188. 1 Burr. 146. Peck. 60 182 1 Mil. 140.

But private surveys & inquiries are evidence only, between the parties to them & their privies. 2 S. R. 437. Sha. 68 Peck. 85.

When parish registers are kept as in Eng. the register itself or a sworn copy of it, is evidence of births, deaths and marriages. even though records in Gt. would be if they were recorded there as the Stat. requires. Sha. 1073. Peck. 86. And the certificates of persons authorized by law to solemnize marriages are evidence of the fact of marriage.

Antient maps, tho made without public authority, are evi-
dence, when they accompany prop^r & agree with the bound-
aries as adjusted in antient purchases. Gilt. 78. 1 L^a Ray?
734. Stra. 75. Peak ba. 18.

We are next to enquire in what cases an
inspection of public writings may be ordered in favour of a party or rather
Records of etc of justice are open to the inspection of all persons inter-
ested in them. The prop^r is bound as of course in right to
submit them to the inspection of all persons claiming interest
existing so far as anything under them. 1 Will. 297. 2 Stra. 1262.
Hendk. 628.

Copies from the books of public officers (as State Treas^r &c) are
demandable by all persons interested, unless the govt. sh^d think that
public policy requires their contents to be kept secret. 1 Stra. 304.
2 T.R. 616. Peak. 92.

If inspection is refused the courts will by rule
grant leave to inspect or in other words order the off^r refusing to
permit an inspection. Stra. 304. 1005. 1223. 1242. 2 T.R. 616.

The books
and papers of a corpⁿ are also open to the inspection of its members
for they are interested in what they contain. & in a suit between
the corpⁿ & an individual corporⁿ or two members of corpⁿ an
inspection may be procured by rule of Ct. But this cannot
be done in a Ct. of Law in favour of a stranger, in a suit be-
tween himself & the corpⁿ. This wd be to oblige a party to pro-
mise ev^{ts} ag^t himself to which the other party has no title for
these books are not public prop^r. like records &c. 1 T.R. 689.
3 ib. 303. 570. 8 ib. 590. 1 H. 12 211. 3 Will. 398. 2 Ky. 621. This it has
been done as you will see by and.

A court of Eq^{ty} may in its dis-

certain order or inspection of the corp^l books in favour of a stranger. for it is the exclusive province of this court to force one to give evidence ag^t himself in favour of another, even his personal oath if required. 2 Ky. 621. 8 T.R. 592.3.

In a criminal prosecution ag^t a corp^l or its members no court whatever can order an inspection of the corporation books, for in such cases it is a maxim *nemo res accusari debet*. 2 Stra. 1210. 1 Wils. 239. 1 Bl. R. 37. Peck. 94.5.

This last rule however does not apply to informations in the nature of *quo warranto* ag^t a corp^l for tho' that proceeding is in form criminal, it is in effect civil & is governed by the same rules as civil proceedings. 3 T.R. 574. Peck. 95.

Of Private Writings.

Wherever a fact is to be proved by a deed or other private instrument, the orig^l instrument must be produced if it is in existence and in the power of the party by whom the fact is to be proved, & if it is not seen no ev^{ce} of the contents of the inst^l can be received. This is much an example of the primary rule that the best evidence wh. the nature of the case admits must be produced. 10 Geo. 92.3. Gilb. 93. Peck 96.7.

When a deed is in dispute the counterpart may be used in evidence ag^t the party by whom it was made & delivered, tho' not ag^t the other party or a stranger. Thus A sues B & C on a counterpart to A's, the latter is good ev^{ce} ag^t B, but not ag^t C or a stranger. Peck. 96.7.

Although the orig^l inst^l be casually lost or destroyed an examined copy of it, or even a parcel with its contents may be received

for this west sight secondary has now become the best ev^{ce} the nature of the case admits of. In this case however it is indispensable that the existence & loss of the orig^l should be proved first. presumption west will be suff^t to prove the loss, but the prior existence must be strictly proved. 3 T.R. 151. Sta. 526. 70. 4 East. 585. 1 Campb. 193.

The rule is the same you will recollect as to records & other public writings. In both cases however if the party voluntarily destroyed the writing. he cannot adduce this secondary ev^{ce} it must have been lost without his fault - and if it is so lost the law will not allow a man to be deprived of his rights by the casual destruction of the best evidence.

A party in suing upon a bond or note in propⁿ of assign party must give notice to the assign party to produce it at the trial, and if he does not, secondary ev^{ce} of its contents will be rec^d. Diff must prove it genuine - in propⁿ of assign party that he had notice to produce it, for if he had not notice, it is Diff's own fault that it is not produced. 1 Atk. 246. 2 T.R. 201. 2 B & P. 39. 237. 1 Ch. B. 206. 10. 1 Esp. R. 511. Pea. Co. 165. Peck Ev. 97. 107.

The same rule applies to every other document whatever, e.g. a letter. But a court of law now can compel the opposite party to produce the instrument, all they can do is to allow the admission of secondary ev^{ce} a C^t of Eq^l & Co. compel the production of the orig^l.

The same rule as to notice as the law now stands obtains in criminal cases. as if A is indicted for having forged a note now in his propⁿ secondary ev^{ce} of its contents may be given after notice to produce it. It was formerly that that no secondary ev^{ce} could be admitted ag^t Diff.

in a criminal prosecution, but it is now settled that it can be. *W. v. T. A. & P. v. W. & P.* 2 T.R. 201. 1 McCr. 346. *Grady v. C. & P.* 2 T.R. 201.

Notice is to be given in writing according to the rules of practice, and as to the facts of notice, that may be proved without subrogating notice to prove the previous written notice. For thus notice might require notice ad infinitum. *Peak* 108. 2 B & P. 39.

And with regard to notice in civil cases, notice to the atty. of the party proposing the instt. is as effectual, as to the party in person. & this is the usual practice. 2 T.R. 203. 3 B. 304. *Phil.* 12.

If the origl. instt. is in the hands of a third person, he sh^d be served with a subpoena duces tecum, to appear & bring with him the origl. instt. and if after service he delivers it over to the adverse party secondary evidence may be exhibited the party being deemed to have suff^t notice. *Pra.* 97. app^t 38.9.

If there is a subscribing witness to an instt., he must be called in person to prove it, if he is alive & in condition to be examined, for he is deemed the best witness of the fact of exst as the parties select^d him. 5 East. 16. 4 B. 239.

But if there are several attesting witnesses, the exst may be proved by one of them. I am now speaking of 1st. instt. as under court order de. as to deving in person. 7 T.R. 266. *Phil.* 6. 169. 364.

As a consequence of the general rule that a subscribing witness must be called, it is settled in Eng^l that when the confession of the party ag^t whose own instrument is offered in evidence that it is genuine, does not dispense with the necessity of

of calling the subscribing witness. See the case of *Leach* to the King
on such evidence. Doug. 216. Esp. 257. 2 B & P. 85. 7 T.R. 267. 1811. The
89. 2 ib. 239.

This rule however has been exploded both in N. York and
here: for in those states the confession of the Def^t is consid^d. as good &
even better evidence of the re^{al} than the testimony of the subscri-
bing witness. See. Ex. 28.9. 2 Johns. 451.

The Eng. rule is admitted
to in the Eng. courts, even tho the orig^l inst^t is lost or cancelled for
secondary evidence is not admitted, if a subscribing witness is known
it is within the reach of production of process. Peak 98. App^r. 39.
Peak 30.

And in Eng^d a confession by Def^t in his answer in 6thth
is not suff^t evidence of the re^{al} when there is a subscribing witness
unless suff^t reason is shown for not producing the witness. This
appears to me to be carrying the rule very far. Peak 98. 2 East.
53.

But when Def^t produced a deed before commissioners of a B. & C. and
admitted the re^{al} of it in his examination under oath before them
it afforded suff^t evidence of the re^{al} without the subscribing witness
here was not only confession but production by a party. 5 T.R.
366.

So also when a party pending a suit confesses & agrees to ad-
mit the re^{al} on trial, it is suff^t. tho the confession alone would
not be. for he is bound by his agreement. 2 B & P. 85. 5 Esp.
16.

If there is no subscribing witness, inferior evidence, as of the
hand writing, is admitted. & is suff^t to prove re^{al}. 1 Lew. 256.
Ing. "Facts" B. 4. 5 Esp. 16.

So if the person whose name is subscribed

as a witness denies that he saw it executed, other witnesses may be called to prove it, as a bystander or the named writing may be proved: wh. will be suff. Peab. 60. 146. Doug. 216. 3 Esp. 173. 2 Campb. 365. 636. 10 Vy. 474. contra 1 Campb. 212 denied)

I wd observe

by the bye that it is not necessary that the attesting witness sh^d have actually seen the ex^{ec} of the inst^t: it is suff. that the party at the time confessed it & requested the witness to subscribe as a witness. 2 B & P. 217. Pea. 98

If it appears that the name of a fictitious person has been subscribed as ^{attest} a witness, by the executing party, the ex^{ec} may be proved from the named writing of the party for it is in legal effect so attested. Peab. 60. 23. 5 Esp. 16.

Phil. 363

The rule is the same when the witness is interested at the time of ex^{ec} & continues so at the time of trial, the witness being incompetent, the case is the same as if the inst^t did not purport to be attested. 1 P. W. 289. Stra. 34. Peab. R. 147. 5 T. R. 371. 2 East. 183. thus suppose the witness had given collateral security to obligee at the time of ex^{ec} wh. is in force at the time of trial.

Rule is the

same when the person subscribed as a witness without the knowledge & consent of the parties, for he is a mere volunteer and not a subscribing witness within the meaning of the law. 3 Campb. 232. 2 Taunt. 220 Phil. 363.

Same rule holds if after drawing nothing can be heard of the subscribing witness (who is supposed to be competent) so that the party can neither produce him nor prove his hand writing. Phil. 364. 1 Haywood. 208. 3 Binn. 192.

The rule is the same if the subscribing witness was at the time of Ex^r legally infamous, for his oath could not be received & therefore his handwriting cannot be proved, so the inst^t is unattested. Phil. 364.

Now I would make an genl. remark which is plainly deducible by way of criterion, from the foregoing rules, that whenever the inst^t is in fact or in law unattested, the execution may be proved by secondary evidence, or confession, the testimony of bystanders, or proof of the party's hand writing. This being in this ca. the best evidence. Com. Dig. "Ev" B. 3. Pea. Ca. 145. 10 Vy. Int. 274. 4 East 53. 5 Esp. 16.

On the other hand if the instrument is properly attested but the witness becomes incompetent by some subsequent cause or cannot be produced, his hand writing may be proved thus

If a subscribing witness becomes interested after the ex^r by act of law as becoming Ex^r, or of the party by whom the instrument is to be proved, proof of the witness's hand writing is to be produced, for he was competent at the time of attestation. 2 East. 183. 1 P. W. 289. Sta. 34. 5 T. R. 371. 2 Phil. 362.

(I omitted to mention in its place that proof of the party's hand writing when that is proper evidence, is *prima facie* evidence of the sealing & delivery. from which I may presume the instrument what it purports to be. Pea. Ca. 145. 10 Vy. Int. 274. Phil. 364.)

So also if the subscribing witness is dead or presumed to be so, proof of his hand writing is suff^t. 12 Mod. 607. Pea 100. 1 B. 2 P. 360. 7 T. R. 265. 1 L. 230. 1 John. Ca. 250. 2 Atk. 48.

So also if a subscribing witness afterwards becomes blind & that it is impossible for him to identify, or if he becomes insane proof of his hand writing is sufft. prima facie ev^{ce} of the re^{al}. 1 Gallay? 734. 5 Esp. 16ⁿ 9 Vry. Junt. 381. Phil. 362.

^{the} Rule is the same when the witness becomes legally infamous after the re^{al} of the Just. 2 Stra. 833. Esp. D. 258. Phil. 362. 5 Esp. 16ⁿ.

So also if the attesting witness is at the time of trial in a foreign state or abroad whether domiciled abroad or not, evidence of his hand writing is sufficient. 2 East. 250. Esp. Dig. 258. Peck. ba. 99. 1 Esp. ba. 1. Pea. Ev. 100. T.R. 266. Doug. 93. 1 B & P. 361.

Rule is the same if after diligent search the subscribing witness cannot be found, tho he is not proved to have gone abroad, since he himself cannot be produced. Doug. 89 & 93. 2 East. 183. 7 T. Rep. 266. 2 Campb. 282. 1 B & P. 360. 11 John. 64.

Now in all the above cases when the subscribing witness is not in a situation to be examined, proof of his hand writing is deemed the best possible evidence, & if there are several attesting witnesses, either of wh. can be examined, ev^{ce} of the hand writing of one of them will be sufft. Phil. 169. 364.

And proof of the hand writing of the witness has been adjudged sufft. without any proof whatever of the party's hand. and the weight of authority is that it is not necessary to prove the hand writing of the party in this case, tho it is usual to do so. I remember that I do not see why proof of the party's hand is not the best evidence, for proof of that of the witness does not show that he would testify if produced that

the instrument was legally executed in his person. *Pea.* 99. 100.
Phil. 169. 362. 3. 3 *East.* 183. 250. 1 *D. & C.* 360. 4 *Solmes.* 461. 7 *T. Rep.*
266.

according to such opinions the party, bound in
this case must be proved. 7 *T. Rep.* 266. n. c. 2 *Haywood.* 27. 3 *Bin.*
192. 2 *Barr.* 187. 1 *ib.* 255.

And in this case proof of the handwri-
ting of a witness is evidence of every thing appearing on the face of the in-
strument. the signing sealing & delivery will be presumed. from
the form of the attestation. 1 *Beauf.* 375. *Phil.* 363.

In *Cont.* when the
testimony of a subscribing witness cannot be had, for the reasons
above mentioned, the practice is & always has been to prove the hand
writing of the party, not only where the issue is in law or fact in attes-
tation, but where it is legally attested. & this is regarded as the best evidence
under the circumstances of the case.

And where the law does not re-
quire a subscribing witness as to a bond, note of hand or *cont.* proof
of party's hand alone is sufft. *Lex. Eov.* 27. 8.

When there are two co-
obligors. & no attesting witness, one of them being sent alone, the other
was admitted to testify to the *act* by *Dist.* *Atta.* 35. *Phil.* 364. this
always appeared to me questionable from the interest of the party. the con-
fession of one joint obligor binds the other it is true. but will it prove
that it is coobligor?

When in any of the preceding cases, the second party co-
is sent to be sufft. the meaning is merely, that it is sufft. to re-
duce the inst. admissible evidence to go to the Jury. that it an-
thorizes the *ct.* to let it in to the Jury.

If there are two subscribing wit-
nesses of whom only one is in a condition to be examined, he must

regularly be produced. Peck. 101. 2. But if both are in a condition not to be examined, proof of the hand of one of them is sufft. tho it is clearly advisable to prove that of both. 1 B.R. 360. 1 Me. 310 2 East. 250.

In all the preceding cases when the subscribing witnesses cannot be examined, if the instrument is, at to be sealed & delivered it is strong w^{ch} to the Jury that all the formalities, as making the same been complied with. Pea. 99. contra. Gibb. 101. B. & P. 254.

In proving devises, to the validity of wh. three subscribing witnesses are essential by Stat. if any one is in a condition to be examined he must appear. proof of his hand is not sufft. Pea. 101. 2. 372. Thus far the rule is the same as in proving 6 L. instruments.

If however they are all dead, you must prove the hand writing of all of them & also that of the testator, but the rule is difft. from rule of w^{ch} in 6 L. inst^s for in proving them the hand of one witness is sufft. to be proved, & it is in no case necessary to prove the hand of the party executing. Com. Rep. 530. Stra. 1109. Pea. 101. 372.

And in such a case, such w^{ch} being produced, unless strong circumstances appear to the contrary, a compliance with all the formalities & requisites of the state will be presumed. 11 C. & P. 265.

If the witnesses are all living the w^{ch} of an will be sufft. if he testifies to all the requisites, unless the devise is disputed, when all the witnesses in condition to be examined must be called. 1 P. W. 741. 1 B. & P. 365. 4 Burr 2224. B. & P. 264. Peck. 101.

But a court of Ch^l will
never

decree a decree, provided unless all the witnesses capable of testifying are examined, even tho' one is beyond sea & the decree is not disputed. The reason is that a decree of the C^t of Ch^l is conclusive upon all the world, whereas a judg^t at law is subject to be reversed in which one party claimed title under the will is not thus exclusively conclusive. Pow. Dec. 713 1 Wils. 216. 1 Ky. 171.

Our courts of probate will declare a will proved on the testimony of four witnesses if he swears to all the requisites. There is however an appeal from the decisions of the C^t to the Sup^t C^t. Sw. Ev. 27.

Tho' all the attesting witnesses to a will sh^d die, the C^t of it, yet it may still be proved by the testimony of other witnesses. Tho' they are first to be called, their testimony may be disproved for it is not conclusive. 1 Bl. Rep. 365. B. & P. 264. 2 Stra. 1096. Skin. 79413.

When a deed offered in evidence was executed under Power of att^y the power itself must be produced & proved like any other instrument (i.e. deed) the ex^t of both must be proved by the party claiming under them. Sug. dms. Ven. de. 265. 1 Esp. 90. 2 ib. 239. Sw. Ev. 28.

I have observed to you that proof of the ex^t of the inst^t might be made out by proof of the hand writing. The question then arises in what manner is the handwriting to be proved? the simplest way of this w^d be the testimony of one who saw it subscribed by the person; if neither cannot be had.

It is & must be a rule that the belief of the witness must be rec^d both in civil & criminal cas. 1 Burr. 642. Peck. 102.

But to render this belief availing at all, it must be founded on a

familiar acquaintance with the hand writing of the party. for without this he cannot be admitted to testify at all. And this acquaintance must be derived from having actually seen him write, or rec^d letters from him in the course of a correspondence, it is not suff^t to have seen writing purporting to be his. 1 Burr. 627. 1 Bl. R. 384. D. C. P. 235. 6. Pick. Ev. 102. 4. App. 7. 11 & 12.

And the witness having seen the party write his name pending the suit to show the witness his mode of signing is not suff^t to let in his ev^o. this wd be to permit a party to make ev^o for himself. 1 Esp. R. 14. 15. 6 L. B. 207. 22. 6 L. 421. 4 Esp. 238. 8^m

And a witness in testifying his opinion must speak solely from the appearance of the writing, without taking into considⁿ any extrinsic facts whatever, as that he shd not suppose Def^t. would give such a bond. Pic. Ca. 142. Pic. Ev. 102. 3.

And in proving the hand writing of a witness evidence that other instruments attested by him were forged is not admissible to counteract any presumption arising from proof of his hand writing. — it is irrelevant. Pic. 100^m.

In the proof of hand writing there is one species of evidence about which there is much dispute i.e. evidence from comparison of hands. And on this subject the gen^l rule is that comparison of hands is no evidence at all in any case either civil or criminal. 1 Burr. 644. 13. N. P. 236. 4 Bl. 358. 4 T. Rep. 497. 1 Esp. 357. 4 ib. 273 & 26. Pic. Ev. 102.

Now in most of the rules applying to this subject there has been no definition given of "comparison of hands". if there had been much misapprehension would have been avoided. It must

sent a comparison to be made by the Jury between the writing in question & other writings, proved or admitted to be the parties, or a similar comparison to be made by a witness, who is to testify his opinion from the similarity or dissimilarity of the two writings. 4 Esp. 273. a. b. c. d. e. Peck. 104.

Ex. action on bond. the question is, did Deft. sign it? to prove it Piff offers in ev^{ce} other instruments wh. are admitted or proved to have been signed by Deft. that the Jury may take & compare with the bond. this is not admissible.

2dnd question the same & other writings introduced as before. but Piff offers a witness who is unacquainted with Deft. hand, to testify his opinion after comparison. this is also inadmissible.

So that comparison of hands is no evidence & the rule holds equally in civil & criminal cases, altho it was formerly held to be admissible in civil cases. Since much fault has been found with the conviction of St. Videns, as the papers were proved to be his (or s^d to be) from comparison of hands, His conviction however as far as it relates to evidence was clearly legal both according to the law now in force was - see Hurm. Bl. Com. St Tr. Phil. 366
That this rule is now good see ante. Sup & Gibb. 53. Meix. 392.

On 6th comparison of hands by the Jury has been allowed but I trust it would not now be consid^d as law. it is not any where. See. Ex. 11. 1 Post. 107. The decision went upon the ground doubtless that our Jurors were composed of men who could read & write & therefore they could judge from comparison. But the fact is, it is a matter of the most skill to judge of

imitation, & I doubt whether there ever was a person capable of doing it, and no evidence should ever be submitted to a Jury which even our juror could not comprehend.

But when the antiquity of writings renders a personal knowledge of the pen his hand impossible, as the old entries in a parish register, witnesses who had made himself acquainted with the characters then used by often inspecting them may be admissible w^{ch} is inceptate for this form, or is abt. to the gov^t rule. B. & P. 236. Pea. 104

And it seems that persons technically skilled in detecting forgeries have been admitted to prove that the signature in question appears to be written in a feigned, disguised hand, but the rule was never carried so far in Eng^d as to allow such persons to testify from comparison. I think however that according to principle such skilful persons as butchers, druggists, &c. might be permitted to give their opinion from comparison, & there has been a decision of this kind lately at Hartford. 2 T.R. 247. 2 Esp. 145. Peak 80. 105. 6 appⁿ 11 & 12.

The English is appl^d to the Eng. rule last stated but it appears to be law.

There are cases in wh. instruments may be read in evidence without any direct proof of their ex^{ist} as if it were in poss^{ess} of a disinterested party, & after notice he produces it at the trial, it may be read without proof of ex^{ist} because the party himself produces it as genuine. Pea. 103. 9. 2 T.R. 43. 4. 5 Esp. 17.

And the rule was once determined to be the same when the adverse party who produced the writt was not himself a party to the

inst. But that determination has been & I think very properly over-
ruled, for either he may have an interest in it, yet not being a party
he cannot be presumed to know whether it is genuine or not.
8 East. 548.

It is an established rule also that a deed of 30th standing
may be read in ev^{ce} without proof of exⁿ provided the pop^l has
followed the terms of the deed, and there is no reason or altera-
tion apparent. Bull. 255. Gilb. 100. 1 Esp. 275 2 Bl. R. 532. 2 J.
R. 466. 5 A. 259. Esp. 277.

This rule however being founded in
presumption does not hold, when there are circumstances from wh.
a contrary presumption arises, as if the deed appears altered or
void in the land & deed have changed persons then there must
be direct proof of the exⁿ. Bull. 255. Gilb. 100. Peak 110.

The recital of one deed in another has been considered as suff^{ce} ev^{ce}
of the exⁿ of the recited deed as ag^t the party to the reciting
deed, as a recital of a former deed by grantor in a subsequent
one. Bull. 286. Peak. 111.

This species of ev^{ce} however is now re-
garded as only secondary & therefore admissible only when the
recited deed is shown to be lost, or some other suff^{ce} reason given
for not producing it. Hardw. 120. 2 Lw. 108. 6 Mod. 45.

Formerly
if there was any reason intimation or apparent alteration
in a deed, the Judges determined on proof whether it was
good or not, i. e. whether it is the inst^t. that was delivered or
not. But in modern practice that is left to the Jury under
the issue of non est faciem. 10. 60. 92 Gilb. 104.

We are not to enquire how few written instruments may be explained by wider evidence.

& a deed or other inst. when proved is conclusive upon the parties to it. Hence written of them can contradict it by parol evidence, the deed being high in known solemnity. This is a familiar rule of the C. L. 5 Co. 68. 8 id. 155. 3 Wils. 275. 1 Bro. 644. 92.

The meaning of the rule is that written party can contradict the terms, statements or stipulations in the deed. Thus if a bond is payable immediately it is incompetent for deft. to prove it payable a year hence. — grant to one John his heirs &c

But a latent ambiguity arising in the construction of a deed or other instrument as a devise may be explained by other evidence as parol. 1 T. R. 703. 7 id. 138. 1 Bro. Cha. 472. P. ca. 112.

By a latent ambiguity is meant an uncertainty arising not upon the face of the inst. but from some extrinsic facts provable by parol, this kind of uncertainty may be explained away by parol. thus a devise is made to A. B & it appears there are two persons of that name, or the devise is of B. L. & are both testator had two persons of that name, then it is competent for the parties to show which of the two was meant. there is no ambiguity in the inst. & as it is produced by extrinsic evidence, it may be removed by it. 1 Bl. R. 60 5 Co. 68. 8 id. 155. 1 P. M. 420. 2 id. 35. 2 Vy. 216

The rule is the same when the deviser's name is mistaken or wrongly written in the devise the party may prove that it is the familiar nickname by wh. testator used to call him.

2 B. Mon 141. 1 Day, 11.

But when there is such a mistake the direction of Test^r made long before the time of making the will are not admissible ev^{ce}, this would be going too far from the inst^t. it would be going beyond the proof of existing facts merely. 6 T.R. 671. Pra. 114th

If however the name of the intended devisee is entirely omitted, nothing extrinsic can explain it. the ambiguity is patent & to explain it wd be to make a devise for the testator. 2 Attk 240. Pra. 114.

But when the ambiguity is latent, any circumstances conducing to prove the Test^r's intent is admissible ev^{ce}. 1 Roll. 676.

When there is a right name & a wrong description given to the devisee, the devise may still be carried into effect by parol testimony, if there is no other person to whom the description applies, if there were parol evidence to explain would contradict on part of the devisee thus a devise to A. B. the eldest son of C. the devise might be good if C had no eldest son. A. B. being in age.

And the rule holds converse if the name is wrong & the description right, as a devise to A. B. Bishop of London when there was no such person as A. B. 1 Bro. 664. 30. 1 Vig. Inst. 266. 6 Attk 22. 6 T.R. 671.

So also parol ev^{ce} is admissible to rebut an equity or to assert an implication arising upon the face of the inst^t. As to the first branch of the rule to rebut an eq^{ty} suppose A brings a bill in Ch^{cy} as A. B. on a

written inst^t. now if there has been a subseq^t. parol agt^t.
varying the terms of the orig^t. agt^t. between the parties, it
may be proved to rebut est's Eq^d. This is diff^t. from the
rule of law. & the reason of the admission of parol ev^d.
in wh^d is that it is discretionary with the Ct. to enforce
an Eq^d. or not. 1 Foulr. 384. 1 Vern 240. 1 Pow. C. 427. Tal
Es. 79. 3 PM. 40. 1 Br. 644. 281. "Powers 644"

As to the latter
branch of the rule parol ev^d. admitted "to rebut an implication"
you will observe that implications always prevail, unless ev-
idence is produced to rebut them.

Now it is a gen^l. rule of the
Ct. that the undisposed residuum of Test^r. prop^t. goes to the
Ex^r. If the Ex^r. has a legacy given him the presumption
is that Test^r. intended it should go to the Ex^r. in room of
the residuum, but this is an equitable presumption & Ex^r.
may introduce parol ev^d. to show that the Test^r. did not
intend to deprive him of this residuum, but the Ex^r. party
cannot introduce such testimony to show that he did so in-
tend, for this would be to contradict the legal presumption.
Pier. 113. Tal. Es. 240. B. & P. 297. 1 Pow. C. 427. 2 Atk. 68.
220. 2 Vy. 91.

Another example. It is a gen^l. rule that the marriage
of Test^r. & birth of a child after making a will is an implied
revocation. it is presumed from these facts that if he had foreseen
them he w^d. not have made the will as he has done, this is the
equitable presumption. Parol evidence may be introduced to prove
his intention that the will sh^d. stand, but not to prove that
he wished it not to 5 T. R. 29. Long. 31. Peak. 114. 2 Atk. 576.

1/2 at the presumption of revocation arising from change of testator's estate cannot be removed by parol evidence of intention, because in this case a positive rule of law that the intention governs. 2 H. Bl. 516. Pea. 114.

c. Patent ambiguity is one arising out of the terms of the inst. & appearing on the face of it. & it cannot in genl. be explained by any parol ev^{ce} whatever. One great & suff^t reason is that it is not created by parol ev^{ce} & therefore cannot be removed it. besides, these ambiguities are matters of legal construction, matters of law of course to be determined on the face of the inst. itself. 2 Vern 624. 3 Bro. 644. 311. 2 Atk 239. 3 ib. 257. 3 Ky. Junr. 148. 4 ib. 600.

Suppose a devise runs thus "I give &c. to one of the sons of A." he having several the devise is void for uncertainty, the words import that there are several with distinguishing.

c. & the owner of such building, devises "one of my buildings, to A." there is no such thing as explaining this by parol.

In some exempt ca. however wh. are to be explained by Ex^{ts} patent ambiguities have been explained & words never even used, a construction diff^t from their ordinary import, not however by proving the dict^o of test^r for those are inadmissible, but by proof of such extrinsic facts as the value of the prop^{ty}, condition of the family or estate &c.

Thus a devised his house called the White Tavern to A. the question was, was it intended to be an estate in fee or for life? the facts were that A. had only a remainder in the house dependent on an estate tail which of course must drop before

ad's estate could not in probⁿ and it is all human probability it
die long before that. he was then allowed to take the fee. 1 Bro
Ch². 472. Pow. Dev. 50-19. Pea. 116. 2 Eq. Ca 298. 3 Burr. 1898.
Per. Ch². 71. Salt 234. LaRoz. 831. "Devins"

But parol w^{ch}
is not admissible to contradict enlarge or restrain the express
terms of a written inst^t. Thus if there is a lease or an ag^t for
a lease for 10 y^{rs} at \$100 rent. parol ev^{ce} of an ag^t and at
time of exⁿ, that it sh^d be for 15 y^{rs} or for 50 \$ is not admis-
sible. 2 Bl. R. 1249. 3 Wils 275. 1 Bro. Ch². 92. 249. 1 Font.
188. 6 T. R. 452. 1 Pow. C. 429. 431. Comp. 47.

(Tho a subseq^t. ag^t might be proved to rebut an Eq^{ty}.)

But a collateral matter about wh. the written ag^t is silent
it is not conversant may be proved by parol as if nothing
were s^d in the lease as to repairs. a parol ag^t as to who should
make them might be proved. 2 Bl. R. 1250. 8 T. R. 739.

And parol w^{ch} is always admissible to prove that the written
inst^t is or is not the act of the party whose act it imports
to be. as that a deed was not sealed or delivered, that the devise
was falsely read to devisee, that he was insane or did not execute
it. for here the w^{ch} is not introduced to contradict a valid
inst^t. but to show that no such inst^t exists 8. T. R. 147.
Peck. 118.

So also parol w^{ch} is always admissible to show the contract
illegal. as given for usurious considⁿ. & here too it denies the ex-
istence of the inst^t. 2 Wils. 347. Pow. D. 477. 3 T. R. 474.

So also pa-
rol w^{ch} is admissible to show that an apparent illegality in an inst^t

was occasioned by mistake of the scrivener, as if the bond made
- if it were usurious. bro. 661. 501.

If an ambiguity arises in
an antient instrument, uniform usage under it, wh. is in the
nature of a practical construction may be proved to explain it.
3 Attk 576. 3 T.R. 279. 288. 4 ib. 810. 6 ib. 388. 608. 248. 4 East 327.

When you observe the *ex gr.* is not to show what
the parties meant by the terms used, but to show a constant usage
under the deed it is like a prescription.

But the usage of a fixed
year under a deed cannot be admitted thus. (608. 819. deed)
3 Ky. R. 298. 6 ib. 237. 2 At. R. 449.

Having constantly used the
term written instt. you will understand that I mean an writ-
ten instt. under seal. And a written instrument not under seal
is regarded at G.L. as of no higher solemnity than a parole
ag^t (except in case of a will) and it may be contradicted or
explained by parole testimony. Thus a note reading "in full
of all demands" & not under seal may be proved not to in-
clude all demands, *scilicet* if sealed. 2 T.R. 366. 5 Ky. 287.
1 John. 62. 145. 2 John. Rep. 378. 3 ib. 319. 5 ib. 68. 8 ib. 389. 9 ib.
310. 12 ib. 531. Phil. 74.



Poet Evidence.

Under this was the first inquiry is who are competent witnesses & who are not. When it is necessary to premise that a witness is ~~to be~~ ^{to be} competent when he may legally be admitted to testify, at all & this competency of a witness is a question of Law to be determined by the court & is preliminary to his ex^m in chief.

The credibility of a witness is the credit to wh. his testimony is entitled, this is a matter of fact to be left to the Jury. 1 Burr. 417.

Under the 2^d inquiry, it is to be observed, that in genl. all persons not rendered incompetent by some legal disqualification are of course admissible witnesses. 1 McElr. 95. 6.

But there are many grounds of disqualification. 1st a person can be admitted as a witness who is not competent, not in the full possⁿ of his understanding. Gilb. 144. Pea. 122.

Since idiots & except in lucid intervals insane persons are not competent witnesses, or admissible wh. is synonymous in this place, Bull 393. Gilb. 144 Pea. 122. 3.

The same rule applies to infants of so tender an age as to be incapable of understanding the obligⁿ of an oath & for the same reason. And on this point the rule is that if the infant is of the age of 14 he is *prima facie* as competent as an adult & the onus of proving want of understanding lies on the objector or he no more can be rejected on the ground of age than a witness of 30. 1 Str. 700. Pea. 123. 1 Inst. 65 1 Hale P.C. 163 1 McElr. 149.

Under the age of 14 no infants competency de-

finds on his apparent understanding, & this is to be ascer-
tained by previous evidence by the court, the presumption however
is against his admission. *Gill. 144. Peck 123.*

Formerly it was supposed
that no person under the age of 9 could testify in any case, or
in any time. & those under 10 were very seldom admitted.
Whe 701. 1 McW 153. Pea. Ev. 123.

The rule however now is that
a child of any age however young may be admitted if
apparently acquainted with the obligation of an oath. We
have a case where one was convicted of a capital
crime principally on the testimony of a child of
7 yrs old. *B. & P. 293. Pea. 123. 1 East C. L. 241. Gill. 144. 1 Mc
Whe 149. 154. Lush. C. L. 114. 346. 282. Fort. C. L. 70.*

Formerly infants
too young to testify under oath were admitted to give in-
formation without oath. But this practice is now exploded
there is no such known in 69 of Justice as information without
an oath or something equivalent. *1 McW 150. 1. 291. 2.
14. P. C. 634. L. C. C. 144. 164. 346. 1 & 2. 29.*

The condition of
slavery is not at 64 an objection to the competency of wit-
nesses, as to the local regulations of various states I am not
informed. *1 McW 156.*

Persons deaf & dumb if shown to
be of sufficient understanding, may testify by signs thro an in-
terpreter. The interpreter in this case is to be sworn as
1 they otherwise are. *1 McW 156. 7. 2 Hawk 612. 1 Peck
2. 9. 316 or 348. 324 or 455.*

and even ignorance may disqual

ify a person to be a witness or when it appears upon a previous examination that he is altogether ignorant of the obligation of an oath or of a future state. Leach. 482.

One of our native indians in the previous examination was asked "are you a christian?" "No. I am a presbyterian."

A person may be incompetent to testify from the infamy of his character. The rule is that a person legally infamous is regularly an incompetent witness in any case. Pea. Ev. 124. Gilb. 139. 1 Inst. 6^b. 156^a. 158^a. Stra. 833. 1148.

By a person legally infamous is meant one who has been convicted of some infamous crime as treason felony or criminal falsification or forgery and any thing wh. impeaches his integrity as honesty or conspiracy. 2 Wils. 18. Cowp. 3. 5 Mod. 75. McCall. 206 &c. 463. Salk 690. Stra. 1148. Gilb. 139.

The rule formerly was that a conviction of a crime wh. incurred an infamous punishment as the pillory was a disqualification, no matter what may have been the offence. But now the infamy depends upon the crime without regard to the punishment. 1 Inst. 6^b. 2 H. P. C. 277. 8. 1 McN. 140. 206-208. 2 Wils. 18. Salk 689. 690.

Hence the conviction of an infamous offence a Barrister renders a witness incompetent to testify even tho the punishment sh^d be but a fine wh. is not infamous. Salk 40. 2 Wils. 18. Gilb. 140 Pea. 127.

On the other hand a conviction of an offence not infamous, as a libel tho followed by an infamous punishment

as the felony does not destroy ones competency. 3 Lw. 426. 1 Mc.
Wall. 207. Gilb. 141

When legal infamy is merely consequence
of conviction the party is restored to his competency by a par-
don from the Executive, as of perjury or of any infamous
crime at C.L. & is pardoned by the King. 1 Vint. 349.
LaRue. 257. 8. 1 McW. 213-17. Salk 689. Esp. Dig. 24.

But when the incompetency, is by St. made a substantial
part of the punishment, a pardon by the Ex^{re} does
not restore the party to his competency, as a conviction
of perjury under the Stat of Ely. for a pardon only
disposes with the legal consequences of the Judge
it does not destroy the judge^t itself nor a constitutional part
of it. 1 McW. 235. Salk 514. 690. 3 Lw. 426.

In the
latter case where incompetency is a part of the Judge^t matter
ing short of a reversal of the Judge^t or a stat. pardon will
restore the competency of the party. Salk. 689. Com. Dig.
"Not mori" A. 5.

If one is convicted of a degradable felony dis-
banded in the band the banning restores his compe-
tency for it amounts to a pardon by stat. being a sub-
stitute for ex^{re} Ray. 380. Ray. 37. 8. Crack. 115. Pa. 128.

But a conviction for infamous crime without a judge^t
in pursuance of it does not disqualify a party to be a
witness. for you will recollect that a verdict without
proof is no evidence whatever of the fact found by it
in any case. B. et P. 243. Stra. 161. Pak. 49. Lenn. D. Ex^{re} A. 6. "Not" A. 5.

But proof of the infliction of the punishment ~~made~~
by Judge^t is never necessary to the disqualification of a
witness, the infamy incurred does not depend upon the
punishment. If the conviction is had & judge^t is un-
doubted the infamy is complete. 1 Wils. 18. 5 Mod. 75. Com.
Dig. ibid

And it seems now to be settled on principle & by
numerous & weighty authorities, after a series of contradic-
tory decisions, that the proof of a witness's legal infam-
y can be made out no other way than by producing
the record of his conviction. 8 East. 77. 33 St. P. 292.
Com Dig. ibid. 1 McW. 256. Salk 653. 12 Mod. 584.

It was
formerly the practice to inquire of the witness upon his oin-
din whether he had not been convicted of an infam-
ous crime, & it may be doubted whether this is not still
the rule by some, see. 4 T. R. 440. 1 McW. 210-13. 258.
3 East. 252.

It does not appear settled whether a witness is
bound to answer such a question. I think on principle
that he is not. If a question is asked a witness, the ans-
wer to which would disgrace or expose him to punishment
by the 6th. he is not bound to answer. And a party can-
not insist on the rejection of a witness on the ground of
infamy unless he produces the best ev^{ce} viz. the record
of his conviction. 3 Bamp. 210. 518. 13 East. 58th Phil. 206
to 208. Salk. 153.

Whether a witness is bound to give ev^{ce} that
might subject him to a civil action appears not settled at
C. L. But by stat. 26 Geo. 3. a witness in such case is com-
petent. Phil. 208

The rule that a person legally infamously is disabled to testify relates principally to suits between other parties. He may make an affidavit to defend himself from charges advanced on a motion for information or attachment, otherwise he will be deprived of the means of defence. *Salk 461. 1 McPh 211.*

The good character of a witness not legally infamous may be proved not in order to exclude him but to detract from his credibility; no one is incompetent from disqualification unless it amounts to legal infamy. It is well known the law admits that to impeach his credit is confined to his good character, for that the party is presumed ready to defend so that you cannot prove that he was formerly addicted to lying or that he told a lie in a particular instance. *Bull. 296. 4 Esp. 102. Phil. 212. Peck w. 125.*

And this evidence relating to the witness's character can be given by those only who are acquainted with his good character. And the appropriate question in the Eng. practice is whether in the opinion of the impeaching witness he ought to be believed under oath or whether he would believe him under oath. *Peck ex. 11. 4 Esp. 103. 4. Phil. 212. Peck 125.*

In some on the other hand as our practice has always been, a witness called to impeach another is never allowed to testify his opinion of the credibility of the witness, the question being, what is his good reputation for truth & veracity among those who know him.

But the good character can be given in the first instance to impeach the witness

yet the party who produces him may call on the impeaching witness to disclose the grounds on wh. the opinion is formed. 2 Esp. 103. 3 1st ana.

If the witness to a will an dead & friend in procuring it is imputed to them, devise may give evidence of their genl. character for probity. And sensibly the same rule holds whether the witnesses are dead or alive the only case on the subject however is when the witnesses were dead. 2 Esp. 50. Phil. 212.

Previous dicta made by a witness out of court brok. an inconsistent with his deposition in court may be proved to impeach his testimony. This is not impeaching his genl. character. - Thus a letter, a prior & position he signed or any act of his inconsistent with his present testimony may be proved. 2 Esp. 691. Peake Ev. 58. 9. 125. 6. 3 Baines 279. Phil. 212.

After the death of a subscribing witness to a will his confession on his death bed that the will was forged may be proved to contradict the presumption arising from his attestation, a dicta of his under other circumstances would not be admissible, being made without suff. sanctions. 3 Bur 1244.

But the party producing a witness is never allowed to impeach his character at all, this says A. Butler would enable him to destroy the witness if he spoke ag. him & to make him a good witness if he spoke for him still a party may introduce a witness to rectify a mistake or falsify an error made by his witness but not to impeach his genl. character. B. 1011 297. 2 Baines 556. Phil. 212.

And as one party may introduce ev^d to impeach the
gen^l character of his adversary witness, the oth^r may in-
troduce ev^d to support it, but not till the character is
attacked, for till then it is supposed good. Phil. 212.

According to our practice a party whose witness is attack-
ed may prove a way of answer to the impeaching
testimony that he before has made the same statement.
Eng. decisions contradictory. B. & P. 294. Gilb. 135. 1 Mod
182. & Phil. 212. 13.

The testimony of a witness may also
be discredited by proving that he was intoxicated at the
time of the transaction about which he has testified. 2 Bay. 201.

An accomplice or a participator criminis, tho' the fact of his be-
ing such may affect his character & invalidate his
testimony, may testify either for or ag^t his fellow, when
ag^t his fellow in civil cases he is interested & this will
go to his credit as in tri^{als}. Still as the record will
not prove the fact, he is not deemed sufficiently in-
terested to exclude him, Hardb. 163. 2 Hawk. 60 & 89. Stra 426
B. & P. 286. Sed. & 725.

And if an accomplice whom the P^r or
P^ros^r wishes to improve as a witness is by inadvertence
otherwise made a party, by leave of court his name may
be stricken out or a nol. pro. as to him entered & his testimony
taken. B. & P. 285. 1 Vid. 441. Peak. 138. 9. Phil. 63.

That an accomplice
has not promise of reward or pardon on condition of giving
evidence goes only to his credit & not to his competency, that

is if the condition of the promise is to "give evidence" only, if it were to testify in a particular manner it would render him incompetent. 1 McWh. 120. 200. 1 Ky. 18. 2 Hawk. 288.

It has been formerly supposed that infidels were incompetent witnesses, as having no regard to the obligation of an oath. 1 Inst. 6. 7 Co. 17. Plak. 139. 140. La Bode was much attached to this rule, for he supposed no one but a Christian could tell truth except by mistake.

The general rule on this subject now is, that no persons are to be excluded for want of faith except Atheists, i.e. if they believe in the being of a God, the obligation of an oath and a future state of retribution, a person disbelieving in either of these is incompetent. Will. 538. 1 Edth. 21. 1 Wyl. 24. Sta 1104. 1 McWh. 64. 95. 6. 261.

The consequence is that infidels believing all these are permitted to testify when sworn according to their own notions of a binding sanction. a Mahomedan upon the Koran &c. It is wholly improper then to ask whether a witness believes in the Christian religion. — it suffices. 1 Edth 45. 1 McWh. 95. Plak. 62. 11. 1 McWh. 261.

The question whether he believes these doctrines is usually decided by warning him without oath before he testifies in chief. 1 McWh. 261. Plak 11.

The inquiry has sometimes been made after he has testified by way of cross examination, but this is preposterous the objection goes to his taking the oath. 1 McWh. 259. 4 Day. 56. 7.

And our only hope in an instance at least admitted
proof of the previous dec^{ns} of a witness to show his disbelief in
these doctrines. 4 Day. 57. This is certainly incorrect, the party
may be deceived of the benefit of his testimony without sub-
jecting him to the penalties of perjury.

Quakers are ad-
mitted to testify under affirmation without oath by cer-
tain Eng. stat. in civil cases but not in crim^l pros^{ns}
Stat. 7 & 8 Wm 3. 1 Geo. 1. 8 Geo. 1. 22 Geo. 2. Burr. 1117. Sta. 854
872. 946.

But in crim^l cases a Quaker affirmation in form
of an affidavit may be read to exculpate him on motion
for an information or attachment. 2 Burr 1117. Pra. 143.

By our Stat. I presume throughout the U.S. Quakers are
permitted to testify on affirmation in all cases civil as
well as criminal. A. bar. 559.

Another & the most usual ground of incompetency in a
witness is Interest.

Formerly an interest in the question at
trial in many cases rendered in gen^l incompetent. Salk 282.
Sta 1043. 1 T. R 300. Pra. 143. 5.

This being the most usual objec-
tion & the rule intricate it is important that you understand
the distinction between interest in the question & interest in
the event.

By interest in the question is meant the influ-
ence a witness is under from being in the same situation
with the party by whom he is opposed in relation to the facts

to be tried, or from having or being exposed to some claim
wh. may arise out of the facts in question, tho his rights w?
not not be affected by the verdict or judg^t in the case
on trial. Phil. 35.7. Pra. 124.5.

Thus if an action is brought ag^t
one underriver & another is called as a witness he is
interested in the question, he being exposed to a claim
arising out of those facts wh. would subject the pres-
ent Def.^t

So if there be two several indictments ag^t
A & B for swearing to the same facts. If A calls B
a witness, concerning them B is said to have an
interest in the question, for an acquittal or conviction of
the prisⁿ (A) should not affect him

Again suppose a
master brings an action per quod for beating his servant
offers the serv^t as a witness. according to Lathamfield
he is interested in the question only, for tho his right of re-
covery depends on the same facts, yet this record would
be no ev^d of them in his action. Pra. 166. Stra 595. 944.
1054. 3 Wils. 18. 1 Root 472.

But it is now settled since the case
of Bent & Baker that this species of interest or influence
does not exclude the witness the objection, it going to his
competency but to his credibility & as such may be made
the subject of observation, 3 T.R. 36. 4 Burr. 2255. 2 T.R. 496.
1 ib. 163. 302. 3 ib. 36. 5 ib. 603 7 ib. 60. 603. 4 ib. 20. 589. 1 H.B. 501.

And the quesⁿ now is that a witness is not disqualified
on the ground of interest unless he is in a situation to be

immediately benefited or prejudiced by the result of the
suit. it anc. Pra. 144. Phil. 36. 1 McH. 176. Liach. 151.

Since in criminal prosecution the person injured by the
offence charged is regularly a competent witness for the pros-
ecution altho he has or may have a claim on the party
accused for the civil injury involved in the crime.
4 Brev. 2255. 7 T. R. 60. Phil. 86. 90.

The rule is indeed
sometimes that qualified he is competent unless the ver-
dict on the criminal prosecution can be given in evidence in
the civil suit. This is wholly unnecessary for there is
no conceivable case at C. L. upon which the verdict can be
given in evidence in the civil suit. The qualification applies
then only to cases arising under the Stat. Law. Pra. 146.
45. 6.

Thus on an indictment ag^t A for stealing the goods of B
or beating B. B is a competent witness, yet B may have an
action ag^t A at C. L. but the record cannot be given in evidence
nor can the criminal prosecution at all affect the civil suit
1 Sid. 211. 1 McH. 53. Hard 331. 1 Roll. 403. 2 ib. 685.

And upon
on an indictment for robbery, tho by Eng. law the party robbed
is entitled to restitution on conviction yet he is a competent
witness. If the goods are his he is entitled to them when he can
find them, and in Mass it has been decided that the party
may testify altho the state gave him triple damages. 1 Mc.
et al. 50. 61. 116. 144. G. C. C. 290. 9 Mass. R. 30.

So if one is in-
dicted as a cheat the individual seized &c. 1 Vent. 49.

Salk. 286. Staid. 388. (contra Salk 383. Sta 1043. not law)

On an indictment for perjury the individual injured is a competent witness for the crown. 4 Burr. 2255. 4 East 581. Sta 1230. Pea. 104. (con. Sta 1104. 1042. Mandr. 331. Salk. 283. not law.)

In the case of perjury it is not material whether the witness has satisfied the judge who was recommending him. tho it was formerly thought to make a difference 4 Burr 2255. 4 East 577. 4 Dall. 412. (con. 1 Esp 97. Pea. 60 12 overruled)

And it is said that on a prosecution for perjury under 5th Eliz the party injured is a competent witness altho he has half the forfeiture, because it is said in his act the words of the conviction on the indictment would not be evidence. I conceive it would be used as constituting a part of the regesta of the foundation of his claim to the forfeiture. Phil. thinks the rule the true one tho much is the weight of authority. Phil 85. Gilb. 124. 2 Roll. 685. B. N. P. 289. L'Kay. 1229. 2 Hawk 433

And even persons to whom bounties are given for apprehending & prosecuting offenders to conviction are competent witnesses ag^t them. Miller 422. Peab. 152. 171. 1 May 50. 61. 116. 144. 179. 3 East. 455 4 ib. 180.

The question certainly will occur to you, are not these persons interested in the suit? they are immediately interested in it. But there is a strong exception to the general rule & the reason of it is that without it the object of the Stat would be completely defeated. The

that this makes them competent. when by C.L. they
plainly were not so.

So too on an indictment against
a debtor for tearing up a note or bond the creditor is a
competent witness. *Str. 590.*

So also on a public prosecution
the Stat. of Usury, the borrower or debtor is a competent
witness to prove the whole case which he has paid up
the loan or not (i.e. the usurious debt) formerly thought
otherwise unless he had paid up the debt. *4 Burr 2251*
2 T.R. 496. per 60. 601. 1 Cairn 68. 5 Mass R. 53. Phil. 34^{ma} 39.
40 n.a.

But a person on a penal Stat. who is entitled to part
of the penalty, is not competent to testify in support of the
prosecution, having an immediate interest in the event
the award of the penalty to be received. *1 Esp. 95. Pea. 15th 2nd*
con. Gibb. 132. 3 Mod. 114.

In the single case of a public
prosecution for forgery it has been uniformly holden
that the party by whom the instrument purports to
have been made is incompetent to testify for the public
provided the instrument if genuine would subject him
to a suit or deprive him of a right or claim.

This rule has prevailed since the earliest period of
judicial history. *3 Salk. 172. Stra. 728. L. C. C. 10. 29.*
255. 2 East. Pl. C 995. 2 At. R. 87. Pra. 147. 8. 1689. Phil.
88. to 90. Handb. 331. Water case

and has been incomp-
tency extends to every fact which might conduce to prove
the forgery & is not confined to mere proof of transmitting

Thus in the celebrated case of *W. v. W.* La Chesnais was not admitted to testify until he had a release. However as to a mere collateral fact not conducive to prove the offence he may be a witness as that he is the person in whose name the instrument was made. 2 East. Pl. C. 996. 7. 1 M. & W. 143. L. C. C. 487. Phil. 89.

Upon what principle this rule in the case of forgery was established we are thus yet been able to discover, for in case of theft & burglary, robbery, &c. the injured party is a competent witness & the interest only goes to the credibility. It appears to be an anomaly in the law supported by precedent no judge in Eng. has yet had the hardihood to overturn it. It is said not to prevail generally in this country. Phil. 91 & ^{na}

The rule however does not hold when the party whose name is signed would not be personally affected by the instrument supposing it to be genuine, as the cashier of a Bank in case of forging bank notes. L. C. C. 350. 1 M. & W. 120 123. Phil. 89. Pra. 169.

It also when a banker had paid a forged draft he was admitted after having struck it the charge from his book thus abandoning all claim & recovering it back. Bull. 289. 2 East. Pl. C. 1000. L. C. C. 57. Pra. 169.

That when the person would be at all affected by the inst. if genuine he is incompetent & the rule has been extended to all persons interested in the question, this is not law thus an indictment for forging a will the Ex. & ^{na}

in the genuine will has been declared incompetent & the
rule has been extended to legacies. But this last rule I con-
ceive is not now regarded as law. 2 Mass. 169. 3 Mass. 172. 4 Burr.
2254.

But the person whose name has been forged to an in-
strument of any kind may be rendered competent by a
release from him in whose favour it purports to have
been made. L. C. C. 184. Phil. 98. Pra. 169.

But in current
this general rule has been exploded & the party in whose name
the inst^t is forged may be a witness without a release,
altho the inst^t if genuine would subject him. So that
the rule is precisely the same in cases of forgery as of use-
ary. 10 C. 12. 1. The law is the same in Penn. Mass.
& I think virtually the same in N. York
1 Mass. R. 7. 3 ib. 82. 1 Dall. 110. 2 ib. 239. 2 At Rep. Day's 96.
4 Johnson. 296. 302. 3.

Interest in the suit. The rule is that a person
interested in the result of the suit in which he is offered as
a witness is regularly incompetent to testify.

(I have noticed the exceptions of prosecution for perjury
under the H. of Eliz & of bounty for prosecuting of-
fenders to conviction.) 3 C. R. 36. 7 ib. 60. 603. 4 T. in 2251.
2255. 2 T. R. 296. Pra. 144. 146. 164. 170. Phil. 43. 49. 50.

as a witness in the suit in which he is immediately & ultimately
benefit or disadvantage to accrue to the witness from

the result of the suit. In other words a person is said to be interested in the event of a suit only where on the one hand he will acquire some certain immediate right or exemption from liability or loss by a determination in favour of the party by whom he is offended, or where on the other hand, he will incur some certain immediate loss or liability to loss in consequence of a determination in favour of the opposite party. 3 T.R. 32. 4 ib. 29. 2 Johns. Ca. 236. 4 Johns. R. 302. 5 ib. 527.

And generally the not universally the question whether a witness is or is not interested in the event of the suit is determined by, an other viz. whether the record of the suit in which he is offended can afterwards be given in evidence for or against him in a case in which he is a party.

This has in many instances been considered the only criterion. but it is not so. For it is true that he may be interested when the record cannot be given in evidence 3 T.R. 32. 3. 6. 7 ib. 62. 4 East. 58. 4 Johns. 230. 5 ib. 144. (2 Johns. Ca. 236. that this is not the only criterion see) 4 T.R. 19. 5 ib. 667. 2 East. 561. Phil. 512.

In a suit where A claims a right of common by custom B claiming under the same custom is not a competent witness for A. for you will recollect that a verdict finding a custom is evidence against third persons 1 T. 302. 2 ib. 32. La Ray 731. B. & P. 283. 2 Johns. 170. Phil. 44. 5

So also if the person offended as a witness would be liable for the costs on either side he is incompetent to testify in favour of

that a de. or a guardian or next friend cannot testify in favour
of the infant. Sta. 548. 1026. Gilb. 107. 1 Eq. Ca. 72. 1 T.R. 491.
1 Wils. 130

The same rule holds as to any one who has agreed to in-
demnify the party ag^t costs. he cannot testify for that party
for the record is evidence. So it is with one who has
given security to answer the costs that may be recovered
ag^t Plff. he cannot be a witness, the record would sub-
ject him. Sta. 575. 11 Johns. 57. Sta. 129.

For the same reason
a bail cannot testify for de^f in being responsible for what
may be recovered ag^t de^f for the witness cannot be sub-
jected without the record. The bail however may be us-
told to competency by substitution. 1 T.R. 164. 8 Johns. 407.

So in an action ag^t Shff for breach or neglect of duty
by de^f. The de^f cannot testify unless he has a release from
the Shff. for the record will show that the Shff has been
subjected to what amount. 3 La Ray. 1411. Sta. 630
3 Campb. 523. Prk. 165.

So also in an actⁿ ag^t Master in the
misconduct of his trust. de^f not competent without a
release. - for the record would be an essential part of the
evidence in the subseq^t actⁿ. 4 T.R. 589. La Ray 1007. 1 Campb.
251. 3 ib. 516. Prk. Ca. 53. 54. 1 Esp. 339

a release will not be given in this case. Sta. 1083.
1 Esp. 339. Sta. Ca. 53. 53.

Again in an actⁿ on a police parole
by Bench of Master. The Master is incompetent to testify
underwriting, unless released by them. for if they are subjected for

his bar^y. he is immediately liable liable over to them & is answer-
able evidence 1 Esp. Rep. 339. Peake 160. Phil 47. 1 H. 35. 306. 1 Bault.
208. Stra 575.

So on the other hand if a witness for D^{ff}
would by testifying D^{ff} exonerate himself from any liability.
he is incompetent. 64 Guard^r not competent witness for
his ward because a verdict by ward would prevent Guard^r's lia-
bility for costs. Pra. Co. 84 Hendk 202. Stra. 506. 1026. 2 Mass
R. 244. 2 id. 658.

On the same principle a grantor who has con-
veyed land with coven. of seisin or warranty is inadmissible
to prove grantor's title in ejectment. For by establishing gran-
tor's title he exonerates himself from liability on his own
covenants. & a contrary issue would subject him. 2 Roll
685. 3 Day 430. 2 Johns 394. 6 id. 525. Peake. 170.

The same rule
holds as to a lessor with covenants when eject. is brot. against
lessee & for the same reason. he is incompetent whether the
coven. is express for quiet enjoyment or implied from the word
"demise" Esp. 164. Phil 74.

So a vendor of a chattel is incom-
petent to testify for his vendor in a suit against the latter
calling his title in question, for there is an implied or
express warranty of title in all cases of sales of chattels
6 Johns 5. Phil 74.

But a grantor lessor or vendor with-
out covenant of title or warr^{ty}. express or implied is admissi-
ble to testify for or ag^t vendor, not being interested. Stra.
245. Pra. 170.

So also where the vendor has conveyed with warranty

title as ag^t them only, claiming under himself. He is a
competent witness ag^t all but those then claiming,
as in case of release & quit claim deeds for if purchase
is evicted by others he has no claim over upon the
reversion. 4 Mass. R. 441. 2 Binney 95. 108. 500.

So the inhab-
itants of a town or parish liable to be rated for the poor if not
actually rated are competent witnesses for the town or
parish in Eng^d in a question of settlement, for this in-
terest is contingent. See if actually rated. 4 T. R. 17. bil
157. 2 East 561. Dec. 163. 4.

In Court the inhabitants of
located corporations or towns are always allowed to tes-
tify when the corpⁿ is a party in case of settlement of
paupers, from the supposed necessity of the case & this
tho they are actually rated.

And by the Eng rule as well as over
even the inhabitants of a parish or town are allowed to testify
in support of a quit town act or a prosecution for a penalty
altho the penalty when recovered would go to the support of
their poor tho interest in this case is too remote and
contingent to include them. Phil 48^m

It is a rule that a
third person not a party to the suit in which he is ^{not} com-
petent to testify ~~that~~ he himself that dep^t is in possession. This
rule appears to be very general. The witness has an imme-
diate interest, the rule proceeds on the very supposition
that witness is in possession. Should be ousted should dep^t
prevail. 1 Johns. 68 275. 12 Johns R. 246. Phil 2^m 52.

" (Still left as a question even a party to a suit is liable for himself or his co-party by reason of his immediate and personal interest. Pra 149. 5 Tm 57. Gilb 116. 1 Vm 230. 1 P. R. 57. 1 Day 106. 10 John 128. 1 Day 388. (See next page part)

So the he is a mere trustee having no beneficial interest in the subject. For he is interested in the event being liable for the costs. this liability is certain, & his ultimate indemnity contingent. Deak 149. 3 East 7. Pra 153. 7. T. R. 668. Phil 57. 12 Day 404.

So of an Ex. whether Plff or Def., the whom Plff he is not liable in Eng? to costs. Phil 57. 12. 1 Binn 24. 6 to 16. 1 P. R. 280. 2 Vy. 42. 2 Vm 67. 2 Tra 34. 2 East 183.

Is the reason that his disbursements may not be allowed? Or is it a positive maxim that the presumption of int. in a party shall not be rebutted? The latter

But an ad. durante minor state is after his death, ceases a competent witness for the Ex. For he may, then, no int. Phil 57. 12. 3 East 604

Another number of a corp^o having no individual interest in the suits, are compellable to satisfy for the corp^o. As the number of a charitable corp^o who have no beneficial interest in its funds, & are not personally liable for the costs. Pra 149. 50. Phil 57. 98. Pra 153. 9. John 220. 8. St. 462. 7. Map. R. 378. 3 East 407.

Especially when the corporators are personally inter

acted in the subject: as in a right of ^{com}sump-
tion from tolls &c. 1 Vent 351. Pra. 149. 100 92. 100 174
5. 174

And the smallness of the interest in point of
amount appears to make no difference. Bull. 290
Phil 52. 3. 59. 5. 174. 11 Loken 57. — Cout. 2 Lev
231. Pra. 161. 1 Vent 351. 2 Show. 47. 100 174

That the competency of a corporation is not lost by dis-
franchisement, see Pra. 164. 6 Mod. 165. 100 11
Mod. 225. Phil. 98. 1 P. 27. 595

See if the right of disfranchisement
is irregular, as it may be set aside. 11 Mod. 225. Phil
98. Pra. 164.

So by a resignation of his corporate fran-
chise Phil 98. Loken 432. Com. Dig. Franchise F. 30. post

I doubt the number of public located corporations (as towns
ecclesiastical societies &c.) are competent in all cases where
such corpor^{as} are parties. This is partly from the usual
minuteness of individual interest & partly from suffi-
ciency. Lev. Ex. 57. Phil 58

See of the number of
corpor^{as} of a more private nature, as banking & turn-
pike &c. insurance &c. — As this matter is supposed
to be generally more important & there is not the same
supposed necessity Phil. 58. Lev. Ex. 57 (ante)

you & B. cannot testify for his co-deft. Has his co-deft. 100 go to prove at least that they were not jointly liable as charged (and)

But if in an act. sounding in tort no w^e whatever is given agt. any of the Defs. he is entitled, upon the close of Plffs. w^e. to be discharged - May then testify for the other Phil 61. 1 Geo 237. Gill. 117. Bull. 285. 1 East. 312. 2 Hawk. c. 46. § 98. 3 P. M. 288 1 Root. 134. Pea. 152. 1 New. 204.

But if there is any w^e agt. him the whole ca. must go together to the Jury. Phil. 61. Gill. 117. Bull. 285. 3 Esp. 25.

Lo in Tresp. agt. a charging the wrong to have been committed by himself & B. - if it appears that B. was concerned in the trespass that procepsed upon agt. him & an attempt made to arrest him or the procepsit; he is not admissible for Deft. Pea. 153. Phil. 61. Bull. 286. Hardw. 264. 123.

But somewhat principle, not surely upon that of interest in the suit - He is not actually a party to the suit - Court. 10 Johns. 21. Pl. 62.

Less if none of these facts appear, Phil. 61. Sty. 401 1 Atk. 252 6 Bin. 316.

On an indict. agt. several an having submitted sp^o his firm, is competent to testify for the others: The ca. as to him being at an end. Phil. 62. Stear. 633.

But surely suffering injury by default does not make him competent either for or agt. the others. For this is contrary to the record, & the case comes to him is not decided. Phil. 62. 5 Esp. 155 Bull. 285 2 Campb. 333. 12 Johns. 25

So when one of two on a joint contract has obtained his discharge under the bankrupt laws. For he is a party to the record Phil 62. 2 Esp. 25. & late trials.

So in an action on a joint contract ag^t two, if one suffers judgment by default he is not admissible for the other. For if the action fails it fails as to both (Phil 62). Nor for the Plaintiff for if the action prevails the party defaulted will be entitled to a contribution from his co-defendant. B.C. is not the balance of interest in this case clearly ag^t the Plaintiff? If so who may be not liable for the Plaintiff? Phil 62. 2 Tarrant. 1852.

It has been held that one of two debtors in trover having suffered a default is not admissible for the Plaintiff 2 Campb. 333^m is admissible for the other debtor. For he is not prejudiced at all events; he is not liable it is for the costs of the issue. Phil. 62. 2 Esp. 553. Pra. 152. 3. See 2u. 3u. 3 Esp. 25. & 2 Campb. 333^m. Contra 6 Binn. 319 for the jury may assess damages ag^t all the debtors. See 1 Bay 33.

Is not the rule as first laid down a departure from principle? And not the party defaulting liable for the costs of the issue? If not still then can be but one ass^t of damages. And the other may go to mitigate them. Suppose he were called to prove proof in the other debtors.

If one of two debtors in trover converts a verdict ag^t himself for so much as he is in possession of he is a competent witness for the other. Term. Phil 62. 3. Bull. 285. For a finding in favour of the other can.

not benefit him. The damages recoverable being but nominal.

But a person, jointly liable with Def^t in a suit or liable solely in his stead (tho not himself a party) is an incompetent witness to defeat the suit (Pra 155. 170) tho he may testify in support of it under Sta. 35. Phil 364.^m ante)

Thus a partner of Def^t is not admissible to prove that he is solely liable ~~that~~ Def^t acted as his agent. For the witness would be liable for half the costs recover^d by the Plff. Pra. 155. 170. St. Co. 174. Lu 5 Burr. 2727.

But a release from Def^t would not bar his co-defendants. Pra. 155. 170. 1 Esp R. 103.

A. Eqt. one of two Def^s having no interest may be examined on either side. Phil. 63. 3d ed. 401. Annot. 393. 2 Ch. Co. 214. Where the rule in Ch^l differs from that of C. L.

A Bankrupt is not competent, in an action by his assignee, to prove prop^y in himself or a debt due to himself: as an increase of his prop^y would augment his allowance. Pra 167. Phil. 51. 98. Bull 43. post.

So of his creditors.

For by increasing the bankrupt's divisible fund, the creditors' dividends are increased. Pra. 167. Phil. 51. Sta. 507. 5 Lohy 427. 258. 2 Dall 20. 1 Mass. R. 239. 2 Day. 466. See Sta 650. Indeed the suit is but for the benefit of the creditors.

And the petitioning creditor is not competent to support

the commission by proving it regularly paid out: as he
is obligated by a bond to establish the bankruptcy. Phil.
52. 2 Campb. 411. See 4 Mass. Rep. 257. 52

who has not proved his debt, where the commission is competent
to support it the not so to increase the fund. Phil. 52. 2 Campb.
301. 2 Bl. R. 1273.

Locus in quo the creditor as they bring
parties to the proceedings are intrusted to support the com-
mission. 2 Bl. R. 167. 3. 5. 19. But this obligation
may be relaxed by an order to the assignees. See.

Thus Bankrupt himself is not competent to prove any facts
necessary to establish the commission. For he is inter-
ested in supporting it - the means of obtaining a
discharge from his debts. 2 Bl. R. 168. Phil. 57. 2 Bl. R. 829.
2 Bl. R. 277. 5 Esp. 22.

So too he has blamed his certificate
for his commission & allowance: For if the commission is
not supported, the proceedings under it are void - he
will remain liable for his debts. (Ibid.) But in y^t
case he is competent to increase the fund, as he has
no interest in it. 2 Bl. R. 168. (5.) 2 Bl. R. 70. 1 Bl. R. 269.

But he is competent to explain an equivocal act proved
in the part of the assignees by other witnesses - Thus
to show that it was not an act of Bankruptcy. 2 Bl. R.
168. 2 Esp. 287.

So to diminish his estate - as to disprove
a debt claimed by his assignees as due to him. For his

evidence is ag^t his int^t. Peck. 168. 16 Comp. 70

Argu^t the record being admissible we^e for or ag^t the witness in a future suit is the criterion of int^t in the court. Phil. 48. 9 3 T.R. 32. 7 St. 62. 2 Johns. Co. 236 5 ib. Rep. 257. 4 ib. 302

But it is not universally so. For there are cases in which a witness is shown thus interested tho the record would not be we^e for or ag^t him, but such cases are few. Phil. 49. 50 Gillb. 106. 7. Bull 384. 4 T.R. 19.

Thus in Twp. ag^t a shff by ed. for taking his goods in an ex. ag^t B - B is not competent to prove the value of the goods in himself. For tho the verdict wd. not be we^e for or ag^t him in any suit relating to the title, yet his ex^t duty wd. be discharged if the shff prevailed. (Phil. 52. 2 N. R. 331.) Since an immediate interest in the court

a devisor is not competent to prove the testator's mind, or yet by another devisor in the same will Phil. 57. Qu^o Why not independently of the objection arising out of the St. of frauds Phil. 374-7. Record' claims could not be well - W^d has no interest whatever.

For other cases of interest in the court, where yet records wd. not be ev^e at supra. See Phil. 50-3.

When the witness has an interest in the suit, is balanced, so that he stands in point of interest indifferent he is competent to testify for either party. Phil. 53. Peck 164 Gillb. 129.

has on an indictment ag^t a country for not repairing a bridge. The inhabitants ^{of C^y} are competent on either side as to the necessity of repairs. They being interested as well to have well^y bridges, as to avoid the expense of repairs. (Id. 1 Kent. 351. 6 Mod. 307.)

So acceptor of a bill is competent, in an action ag^t drawer, to prove no effects & thus dispense with notice. Pra. 154. 1 Esp. 332.

So endorser of a note, having rec^d money from maker, to take it up, is competent in a suit by endorser ag^t maker to prove the note satisfied. For he will be liable in one event to the Plff (the endorser) & in the other to Def^t. Phil 55. 2 East. 458. Lualo & Tennant, 264.

And the comparison of proficiency of a witness in forcing a remedy ag^t one or the other party (when he has a claim accruing in either event) serves not to affect his competency. Phil. 55. 6. See also 3 T. R. 579. 2 Sess 399.

In ap^t for money paid to the use of ship owners, the Capⁿ is competent to prove that he rec^d the money from the Plff for the use of ship^s. His liability being no greater in the one event than in the other. (Phil 55. 162. or T. R. 481. n^o 1. Campbell 467. 2 Cairns 77. Peake. 165)

For if he has rec^d the money & not paid it over he must be liable to one party or the other in any event & if he has p^d it over he is not liable to either.

So in case for rent when both parties claim under J. G. he is competent to prove

to whom he made the first base. Phil 54. 3 T.R. 308. 2 Roll. 685
Gill 109.

So in an action by payee ag^t the acceptor of a bill, drawn by one of two partners, ^{in the name of the} in the name of the firm - either partner is competent to prove, that the former has no auth^y to draw the bill. Phil. 54. 13 East. 175.

So in ag^t between A & B. - A.S. who had rec^d from Def^t money due to the Plff was held competent to prove, that he rec^d it as agent for the Plff. Phil. 54. 5 7 T.R. 482. Peake 165.

See if the witness would be liable to a greater extent, in one court than in the other. E.g. ag^t acceptor of a bill, for the accommodation of drawer, the latter is incompetent to prove the transfer usurious - For the liable in either court for the debt; he is also bound fully to indemnify the acceptor & of course liable to him for all damages. Phil. 55. 4 Taunt. 464

There are certain exempt cases in which even a party to a suit is allowed to testify - from a supposed necessity. Pea 150-1. Phil 57.

Thus on the H. of Winton. 13 Ed. 1. the Plff (the party robbed) is competent to prove the robbery & the amount lost - "on default of other proof". Lid. 2 Roll. 6856 Bull. 197.

See as to other facts wh. in common presumption, are provable by other ev^{ts} as that the place, wh. is within the hundred sued. Pea. 150-1. Phil 55. Hardw. 83

Or that he delivered money &c to his servt. who was robbed
Pra. 150^m See Ev. - see Pra. 151^m Bull. 197.

And in an action for malicious prosecution the w^o given
by Deft. on the orig^l prosecution, may be proved by the
in his defence. Sent. (Pra. 151^m Phil 58-g. 6 Mod. 216
Bull 14) This rule is also founded upon supposed
necessity - for the protection of prosecutors.

Thus appears to
be the only case of this description at Com^l Law. Pra. 151^m

But one or both the parties to a suit are in some cases allowed
by stat. law to testify for themselves. Thus by St. in Com^l both
parties are allowed to testify in book debt. account & in ac^{ts}
by receivers of counterfeit money or bills. So the Plff is in
cases of ~~secret~~ assault - bastardy & quitem prosecution for
theft - as to the loss & identity of the property. So the Deft is
in sci. fa. or a judg^t by foreign attachment, or prosecution
upon the stat relating to trespass in the night season &c
Gw. Ev. 81-8. H. C. 99. 101. 546. 134. 660. 2 Bay. 116

So on a similar principle of necessity & "for the sake of trade
& com^l usage of business" agents or servants becoming inter-
ested in the ordinary or regular course of their employment
are competent witnesses for their principals or masters
Pra. 151. Phil 145 Pra. 164. 167. 171.

Ex. gr. a factor may prove
sale of goods for his principal to charge the vendor; tho
entitled to a commission on the sale, Phil 94. 3 Mod 20
1 edth. 228. 2 H. Bl. 590. Bull 269. 1 Johnb. 408. 2 ib. 60. 2 St. Rep. 109. Peak. 165

And in *quid* any one who contracts for another is an agent with
in the rule Phil 94. 2 H. Bl. 591

Co of the Steward of a manor
when instructed to support a claim by the lord. Phil. 94. 3 H. Bl. 90
Harrow. 360

So an agent is competent to prove in favour of his
principal, a pay^t of money delivery of goods &c. tho he were
going to discharge his own liability to the principal. Pea. 151. 2
164.5. H. Bl. 129. Bull. 289 Phil. 94. 11 Mod. 262. 4 T. Reps
589. 590. 2. Exp. 509. 3 ib. 48. Sal. 289. Stra 647.

So if the a-
gent has over p^d money or p^d by mistake, he is competent to
prove it in an actⁿ by master to recover it back. Phil. 95.
Stra 647. 3 Campb. 144. Pea. 164. 2 John. Ba. 270.

So as to
the acts of serv^t not done in the ord^y or regular course of his
employment & claimed to be violations of trust or duty
these are not within the principle or reason of the rule
Phil 95. 6. Bull 289

E. g. In an actⁿ to recover back
money h^d out for illegal purposes or squandered by off
serv^t Phil. 95. 6. Pea 164. 2 Camp. 199. Serv^t not com-
petent to support the action without a release. For the act
is not in the regular course of his employment & if no rec^d
is had he is liable to the master.

So in an action ag^t a
master for an injury done by the negligence of his serv^t
the latter is not a competent witness for his master
Pea. 165. 6. 2 Stra 650. Goddard. 1411. 4 T. R. 589. 1 Exp. 339. 6 ill-73
1 Campb. 251. For he is liable to indemnify his master if

Diff. he wants.

Compulsory ordered by release. Rea 166

Rea 166. Rea 166. 2d. 100.

... not for anything. If you
on ship board, the master is not a witness for Diff without a
release from the Diff. For his 10th would not be to prove
an act of his own in the ordinary course of his employment
Rea. 166. 4th 84.

So in an action upon a policy of insur-
ance for benefit of the master it is not admissible for Dep^t
unless released by them Rea 166. 1 Esp. Ca. 339.

An agent who
competent to testify, is so, to prove his own act. Phil. 96. 2 Ball
300.

But he cannot prove the contents of a written authority with-
out producing it. Smith Phil. 96. 2 Ball. 246. 1 Esp. 406. 11
100. 18 403

But can one who has purchased goods in his own
name, testify, (for vendor), that he purchased them as agent
for diff. Phil. 95. 3 Campb. 317. See also the analogy
to the case of a dominant partner.

It was once held that if
a witness supposed himself under an honorary obligⁿ then not
a legal one to incriminate a party. he was incompetent to
testify for that party. Rea. 157. Sta. 129. Phil. 41-2. 1 Mc
Nay 140. Esp. 707.

But this rule has since been denied & seems
not to be law (see side. 5 Wap. R. 518. 3 Johns 428. 1 Ball
62. 2 ib. 50. Phil. 141-2 1 Campb. 145. 9 Johns. 219) but
it may go to his credit Phil. 42.

The interest which excludes a witness must have existed
it is said at the time when the act or fact in q^u took
place - or have accrued afterwards by operation of law or by
the act of the party who offers him as a witness. Pea. 157
185 Phil 100.

An interest acquired by W's own act then,
without the concurrence of that party does not, as has been said,
disqualify him, otherwise a witness might in every case
surprise the party of his testimony: & the opposite party might
sometimes do it. Pea. 158. 185. 4 Kim 586. 3 T. Rep 27 33-4 37
3 Johns Ca 237. Phil 100. 4 Ma 206.

Thus if a witness to a bond
or other contract makes a bet, that the party claiming under
recover in the q^u action founded upon it. he is still a com-
petent witness for p^lff. & compellable to testify. Pea. 158.
Bull. 290. Phil 100. 4 Kim 586.

So if a prosecutor, or other per-
son, privy to the commission of a crime by another, lays a wager
that he will be convicted, the former is competent & com-
pellable to testify in support of the prosecution. Id. 188
652. 1 McEl 125. 3 Sw 152.

So when A a broker having pro-
cured B to underwrite a policy, afterwards became an owner
wrote himself, it was held by 2 Bingham & Ashurst J. q^u
B could not be thus deprived of his testimony, even if the let-
ter had become material in the event. 3 T. R. 27. Phil 100
(3 Campb. 380 cont. sent.)

Let q^u whether the rule is not laid
down too generally whether the division in the last ca
is law. Kindred whether the rule extends to every other case

than those in wh. y^t act creating the int^t is either fraud^t
is intended to deprive a party of testimony, or merely gra-
tuitous; as in the above case of wages. Phil 101-2.
1 Mass. 426 9. 3 Campb 380.

For if a person acquainted
with a transaction in wh. others are interested, afterwards
in the regular course of business bona fide becomes
interested in the result of the suit arising out of it, he is
according to the latest determinations incompetent. Thus
where an underwriter who had paid the loss upon an ag^t
y^t y^t insured should refund if his action ag^t another
underwriter failed, was called on a witness to prove the poli-
cy void y^t court held him incompetent. Phil 101-2
1 Mass. 426 9. 3 Campb 380.

But where a person having given a deposition, who is
interested, afterwards becomes interested by operation of law
his depo. is admissible, & his deposition is admissible. 2 Ky. 221

Loif he afterwards becomes a party as heir or ex^r to the
single party 12 Mass 692. 1 P. W. 289 2 Asth 615 [Contra if
he becomes a party 'Sal 286. 101. Esp. 756.' But in these
last cases y^t depo^t was in *habeatam in memoriam* to
be made only after his death & in memoriam. Bull. 240-86
2 Ky 22. Peck 58.0

And on the other hand in those cases
in wh. a witness cannot by acquiring an interest subro-
gate a party of his testimony, he cannot by volunta-
rily acquiring an opposite interest privilege himself from
testifying. For ex. If a subscribing witness to an obligⁿ

Becomes bail for the debtor or party bound, he is still compellable to testify to its debt. *Dea. 185.*

But when a person who becomes interested by giving bail for a party defendant and comes to the knowledge of facts, advantageous to the other party, he is not compellable to testify to such facts, and this is not true to subject him on his bond. *Phil. 101. 2 Root 406.* This interest was antecedent to his knowledge of the facts in question.

But when a subsequent interest in the suit is cast upon a witness by operation of law, he is incompetent to testify in support of his interest - not compellable to testify against it. Ex. gr. an heir apparent, who being concerned of facts, relating to his ancestor's title, obtains and succeeds to the inheritance - an attesting witness to a bond who afterwards is appointed Adm^r or Ex^r to obligor - or obligor. *Phil. 262. 3. 1. 2 W. 287 2 Newb. 69. 34. 5. 2. 3. 2 Esp. 357. 2 East 183. 3 C. 187.*

So if the witness becomes by the act or concurrence of the party offering the witness. Ex. gr. with a usurious bond becomes bail for obligor - cannot testify for him - or a subscribing witness becomes husband or wife of one of the parties. *Dia. 157. 185. 3 Johns. 60. 237. 2 East 183. (ante)*

As a general rule the interest which gives to compellability must also continue to the time of trial: Hence, a removal of it before that time regularly restores the competency of witness. *Dea. 158. Long. 132. 2. 27. 8. 1 Johns. 60. 240 8 Johns. 2. 37. 1 Mass. 73.* Ex. gr. a will attested

by legatee who releases it. He is competent to prove the will.
P. 1. 189. Ph. 97. 8 in Abq. 14. in 58. 1 Bar. 423. 427
S. 7. 189. P. 2. 97. Stan. 1253. Pow. Dev.

It is contra. by Lin & Baundon Ch. 97. Ph. 97. the
1259. Pow. Dev. 124-134 1 Day. 41-88. — Upon the con-
struction of the Stat. of frauds. But the weight
of authorities in support of the will. Ph. 97.

And now by
Stat. 25 Geo. 2 Ch. 6. the legacy or devise to a subscribing
witness is declared void & the witness is competent to prove the
will, as to the residuum. Pow. Dev. 122-3. Pea. 160.
This Stat. being declaratory Pow. Dev. 291 is in affirm-
ance of the will. The Stat. makes the same provision
as to legacies who have been paid or have received or re-
fused pay or retention. Pow. Dev. 123.

By same St. and
the testator being subscribing witness is declared competent
the then debts are charged by the will on lands. Pow.
Dev. 132. 3. 133. 4.

We have a similar Stat. as to devised leg-
acies in wills executed after Aug. 1. 1808. — provided the will
is not otherwise sufficiently attested, in which case if devised or
legatee is in good faith provided also the legacy or devise
is not given to an heir at law of the testator. If given to
an heir, he cannot testify in support of the will at all; &
of course all the dispositions of real estate in the will are
void unless it is sufficiently attested without his name
H. 6. 683.

By the Eng. Stat. supra. a subscribing witness being

a legatee, who dies before testator or before receiving or releasing
of legacy, is a legal attesting witness. Pra. 160ⁿ

It follows from
the last genl rule that a release, to or from, an interested witness
(as the nature of the case may require) - or any other
means, by wh. he is divested of interest at the time of
examination, will restore his competency. Phil. 97. - 8. Peck
158 Doug 139. (post.)

Thus in the case of forgery, if the person
whose the instrument purports to bind, has been released
by the party who wd be entitled to recover upon or enforce
it, if genuine; he is competent to prove the forgery.
Phil. 98. 1 Leach 178. 184. 255. Pra. 169ⁿ (11)

So if the latter
party has, before, set aside the forged instrument by a judgment
of a court. Pra. 169. Bull. 289. (ante.)

So in an action by an
endorser against the maker, an endorser being released
is a competent witness for plaintiff. (1 C. Clap. Rep. 73. Phil. 97.

So a servant for whom wages his master is sued, may on being
released by the latter testify for him. Pra. 166. 1 B. & C. 53. Stra
183. Phil 95. 6. (ante.)

So a bankrupt who has obtained his cer-
tificate & given a release to his assignees may testify for them
to prove profit in himself & thus to increase the fund. Phil. 57. 119
Pra. 167 Bull. 23. 2 T.R. 297. (ante.) But not to support
the commission. (ante.)

As to members of corp^s being sworn
see (ante). -

And when a release pay^t to or from a w. w^d. if ac-
cepted, custom his competency, a tender of ~~it~~ on the same side
the refusal on the other, will have the same effects. Pra.
158. Phil. 99. Long. 139. 3 T. R. 35.

And if a legatee or devisee
being a subscribing witness to a will & tender a release,
wh. is refused, he is competent to prove the will. — Or if pay^t
of the legacy has been tendered to him & he has refused it
he is competent & compellable to testify. Phil. 99. Pra. 158. 9th
Long. 139. 3 T. R. 35. 1 Burr. 447.

So doubtless a debt for whom
negligence the master is sued is compellable to testify upon a
release tendered by master; tho refused. Pra. 158.

So of a
bondsmen for precaution, if a release is tendered him
by Dep^t.

But if a person gives a deposition which interested
in the writ & his interest is afterwards removed the
depo^t is not admissible. For at the time of testifying, he
is under the bias of int^t. Phil. 97. 1 Cairns R. 14. 3 Binn
311. Ex. gra Dep^t bail gives a depo^t in his favour, & the bail
is afterwards changed. ante.

A person is always competent to testify against his interest, tho not
in gen^l compellable to do so. Pra. 160-1. 184. Cal. 691. ante
Lent. 1008. Stra 406. Long. 572. 7 T. R. 178. 2u! a. — latter branch
P. 223 null 2. 223

Persons

Persons are in some cases incompetent witnesses by reason of the relation in wh. they stand to one of the parties, with regard to interest. —

hus & wife are according to the genl rule respectively incompetent to testify for or ag^t each other Pra. 172.3 Phil 63.4 Co. L. 1.5 Bull. 286. Gill. 119. 2 Hawk. c. 46. § 70. 1 Wh. c. 443. 4 & 5 R. 678.

For the particular rules & distinctions under this head see Hus & wife Parent & child. — Suits

Persons living as hus & wife may upon questions as to the legitimacy of their issue, be admitted as witness but with respect to the facts wh. they are competent to prove see references sup. 2 Pra. 182. Phil. 180. 6 T.R. 330. Hardw. 79. Bull. 113. Comp. 572 8 East. 203. 11. St 133.

Counsel, Attorneys & Solicitors are more than compellable nor permitted to swear to confidential communications made by clients in relation to suits, proceedings, or in contemplation of Pra. 176.7 Phil. 72 4, 11 & 120 20. 1 Hawk. 137. Bull. 284. 2 & 3 R. 432. 753. Nor is either of them compellable to produce a paper committed to him by a client in an other cause. Phil. 103 (n) 8 Mass. R. 370. 3 Day. 299.

So the suit or controversy, to wh. the communication is related, is at an end — or the the Counsellor &c has been dismissed Pra. 178. Phil. 103. 4 T.R. 759-60 2 Comp. 578. 1 Esp. 695.

Also cannot testify to facts thus disclosed in a suit between third persons. See

These rules are founded not upon the privilege of the counsel &c but

of the client - the obligⁿ of secrecy never ceases. Phil. 103.
1 Esp. 195. 4 T. Rep. 759. (see Par. Mark not law)

The same rule holds as to an interpreter be-
tween the parties & his counsel att^r &c. In being the organ
of communication between them, is under the same obligⁿ of
secrecy. Pea. 178. Phil. 103. Pea. Ca. 77-8. 4 T. Rep. 756.

But this
privilege of the client is confined to such communic^{ns} as are
made respecting professional business & during the relⁿ of
att^r &c. & client 3 Johns. Ca. 198. 1 McCly. 241. 1 Cairns. 157.

Since an att^r &c. by profession, but not retained as such
is not within the rule: tho he may have been consulted con-
fidentially. Phil. 103. Pea. 169-70. 4 T. R. 753. 760. For in such
a case the relation does not exist.

If the client waives his privi-
lege the att^r &c. is allowed & compellable to testify. Phil. 103. 8 Mass. 370.

But a person who was confidentially consulted, upon the supposition
of his being an att^r when he was not, has been held com-
pellable to testify to the disclosure, made to him. Phil. 103. 6 Esp.
113. See. q^uo. - this inquiry very far.

and propositions made by an authorized att^r to
the adverse party, may be proved by a third person who heard them
tho not by the att^r himself. Phil. 103-4. 2 Campb. 10. For the
privilege extends only to the then cases of Counsel, solicitor
& attorney. - What to students or clerk in a law office by Mr. Gould?

Since physicians & Surgeons are compellable to
disclose information acquired in their professional charac-
ter. Phil. 104. 4 T. R. 702. Pea. Ca. 77. Pea. 180.

So of a Romish priest, to whom confession has been made
according to the practice of the Romⁿ Cath^o church. Pra. 180.
St. ca. 77. Phil. 105. & 1 McMy. 253.

So a portion of a private
confidential friend to whom disclosures have been made, under
an injunction ^{promissory} of secrecy. Pra. 180. Pra. ca. 77. Phil. 104 in
Bull. 284.

And it has been held that the Clerk to Commissions^r
of a tax who had taken an oath of office not to disclose what
he should learn as clerk, was compellable to disclose - on the
ground that in such an oath there is an implied exception
as to what is required in courts of justice. Or in other words
that it extends only to vol^l or extrajudicial disclosures.
Phil. 104. 3 Campb. 337.

And an att^y. &c to a party in the cause
may be examined ag^t his client, as to facts known to him before
he was retained or assigned as such. Phil. 105. Trist. 197. 10 Mod
40. Bull. 284. 4 T.R. 759. Bow. M. 279. 1 Ky. 63. 2 id. 185.

For as he does not acquire his knowledge by the relation of his
client, the disclosure violates no professional confidence. &
even, one party might inform the other of his w^{ill}.

So where he has attested an inst^t to wh. his client is a party
he may be examined as to the v^{er} of it. Phil 105. Pra. 1789.
Pra. ca. 108. 5 Esp. 52. Bowp. 825. b. 4 Esp. 235. For the act of
attestation is not done by him as att^y. but as a witness
selected by the parties.

So if he was present when his client sworn
to an answer in b^{ill}. he may be examined as to the fact of the
latter swearing, on an indictment for perjury. Pra 178. Phil
105 Bull. 284. Bowp. 846. Boutra. Sta 1122. For the fact is

not be communicated to him in confidence, but publicly.

So in regard to any collateral fact, which he knew or might have known without any instruction from his client. Phil. 105. Bull. 284. 11 St. Cr. 253.

As in relation to the fact of an erasure in a deed or will in which his client is interested when his knowledge is not derived from any disclosures by his client. Phil. 105. 1 Kent 197. Bull. 284. as whether the deed were in this present plight.

So as to the contents of a written notice recd. from the adverse party. Phil. 105 7 East. 357.

So in debt on bond Plffs Att^y has been admitted to prove from his own knowledge that the bond was usurious. Phil. 105. Peake 118.

So when after an action on a promissory note had been commenced, the Plff informed his Att^y that the note had been given without any consideration. B. R. held that the Att^y was compellable to disclose the fact Phil. 105. 6 L. J. R. 432. Pea. 179. being disclosed after he was sworn.

And an Att^y is compellable to disclose whether a note put into his hands for collection was indorsed or not Phil. 105 n. 2. 1 Leam. Rep. 258.

If an Att^y interrogates a witness on a trial & the witness in a subsequent cause varies from his answers given to such interrogations the adverse party in the latter suit may call on the Att^y to discredit the witness by testifying to his former answers. Pea. 179. 11 St. Cr. 253.

For in this & in all the preceding cases of objections to the gentleman, the

Att^y does not gain his knowledge from the relation of the client
but otherwise violates no professional confidence. *Bank*
178. 9.

It has been resolved that a person who has put his name to
an instrument to give a sanction to it, is not admissible as
a witness to invalidate it: being consid^d as precluded by a
species of estoppel. *Watson v. Shelly* 15th R. 296.

The rule appears
to have been first adopted in the ex. cit^d. *Phil.* 33. *See Bank*
181. 3 *Burr* 1244. 1 *Bl. R.* 365.

Soon after the same rule was
recognized in a limited extent; viz. as applying to negotiable
inst^t only. 3 *T. R.* 34. *See* *Ex. b. 6. 20. 52 Phil* 34th 1 *Exp.* 298.
Ex. gr. In an action by indorser ag^t acceptor of a bill, that
indorser was held incompetent to invalidate the inst^t as being
proving usury &c. & secondly even to show cases however he
is competent to show subsequent facts wh. do not render it orig-
inally void: as *Ex. b. 6. 52. 3 Maps* *Phil* 34th 11 *Ex.* 128. *Chit. B.* 284. 7 *Maps. R.* 470.

But in the case of
Sourdis v. Lashbrook the rule was denied: & the former
cases overruled. 7 *T. Rep.* 601. *acc.* *Ex. b. 117. 1 Exp.* 176. *See* *Ex.*
Ex. 96. 105.

In reversal of the rule the rule as limited above to
negotiable inst^t has been recognized. 2 *Dall.* 194. 1 *Ray* 17. 301.
1 *Cham.* 258. 267. 3 *Maps. R.* 27. 565. 2 *Lohr.* 165. 4 *Maps. R.* 156. 516
6 *St.* 449. 7 *St.* 199.

See *Ex. b.* the rule in *Sourdis* is disavowed
has been finally adopted by the *6. of Errors.* 1 *Ex. R.* 260. & is
I conceive very correct: as the objection to it goes rather to the

proof of the fact at all than to the incompetency of the
witness.

Objection to the competency of a witness may be taken by ex-
amining him before he is sworn in chief, upon the voir
dire - by the testimony of other witnesses swearing to the fact
wh. render him incompetent - or when his own examination
when sworn in chief. *Pra.* 186. *Phil* 96 56 *Low. Ev.* 149. 10
Mass. 128. 13.

Formerly the objection could be taken only in
one of the two first modes: after he was sworn in chief
the objection was too late. *Id.*

But as the practice now is
the objection may be taken after he has ^{been} sworn & examined in
chief. *Id.* and when it is discovered at any time, during
the trial that he is incompetent, he may be rejected.
Pra. 186. 7. *Phil.* 96. 15. *Rep.* 719. 1 *Exp.* 37. *Phil.* 204. 5. *Low*
Ch. 2 *Vern.* 463 & *Lomb.* 533 *Ph.* 204.

The mere fact that
a witness is discovered after the trial to have been in-
competent is not suff^t ground for a new trial, tho
it may have some weight in connection with other
facts. *Pra.* 187. 15. *Rep.* 719.

When the voir dire, no ex. in probe
might reach as to the competency of the witness. Such as
relate merely to his credit are inadmissible in order that

oath. - the said Syet. Examining a witness under it binds
to exclude him. 1 ell Ch. 127. 208

When his examination under
the voir dire, a witness may be interrogated concerning in-
strument received by him or other persons who create an in-
trust in him without producing them: For the party de-
fecting is supposed not to know what witnesses will be
called ag^t him. So of course not to be informed with view
of his incompetency. Pea. 187. Ca. 110.

An objection arising
from his answer on the voir dire, may be removed by the
answering under the same oath. Phil. 96. And the last rule
holds as well in the latter case as in the former.

Since if on the voir dire, a w. confesses himself to have been
interested; he may restore his competency, by his own testimony
under the same oath without producing the record or
instrument by which his interest has been extinguished. E.g.
that he has become a bankrupt. And he certifies that the
former a member of a corpor^a wh. is a party, he has been
disfranchised &c. Pea. 187. 1 Rot. 226. 7. Phil. 97. Pea. 60.
218. 1 Esp. 162. 4. 15 East. 57. &c. For as the party de-
fecting makes the w. his own for this purpose; he can
not Syet to such answers as operate ag^t himself.

Since if the orig^l int^t is proved by other witnesses, in this
case the certificate is must be produced to restore his com-
petency. And y^e party defecting does not make the w.
his own. Pea. 187.

If a return is given to a witness for the purpose

of entering his evidence, it must be produced. *Pra.* 187

^{He} declar^a of the w. himself, before trial, that he is interested, is not w^e to prove him so. If it were, he might by a falsehood without oath wrongfully deprive a party of his testimony. *Phil.* 96. *W. 5* *Maps.* 261.

But proof of such declar^a by the party offering his testimony will exclude him *Phil.* 96 *W. 8* *Maps.* R. 487.

If the party objecting to a witness examines him upon the same issue, he is bound by his declaration & cannot afterwards call other witnesses to prove his ^{incompetency} ~~incompetency~~ ^{for he has elected his witness & cannot impeach him so as to exclude him} ~~incompetency~~. Under the same rule w^e have been examined under the great oath, but applies also to depositions taken before a magistrate. 3 *Day.* 214. - And the rule holds in converse. *Phil.* 97. *W. 1* *Call.* 272. 1 *Map.* 219. *Pra.* 186. *W. 193*.

In the former ca. however the party may introduce other w^e to prove the fact of his interest & then to discredit the ~~not~~ to exclude him, *Pra.* 186.

A w^e's own declarations may be admitted to contradict himself 8 *Maps.* 287.

The ordinary mode of compelling the attendance of witnesses in civil cases, is by the writ of subpoena ad testificandum. Pra. 191. Phil. 2.

And if the w^d is in possⁿ of any deed or writing which is thought necessary at the trial, he may be compelled by a special clause in y^e writ called a duces tecum, to bring it into court. Pra. 191. Phil. 12. The writ is then called a subpoena duces tecum.

But the witness is bound unconditionally to bring the writing into Ct.; the question whether a party is entitled to produce it in ev^e or have it produced in ev^e may still be submitted to the Judge. Phil. 12. 9 East. 285.

And the w^d is never compellable to show any writing, which is ev^e of his own title, or wh. w^d subject himself to any claim: wh. no one is bound to furnish ev^e ag^t himself. Pra. 191. 92 St. 2^d p. 389. 1 Esp. Ca. 405. 4 St. 23. (anti.) Con. last clause Phil. 336.

c. 61 to the mode of serving the subpoena in Eng^d see Pra. 192. Phil. 4. Cro. C. 512. 540. 5 mod. 355.

In Court it is served either by reading or a certified copy, left with the w^d or at his usual residence.

It must be served in reasonable time, tho no precise period is fixed. Pra. 192. Sta. 514.

In Eng^d the writ issues from that Ct. before wh. the witness is required to appear. In Court it may be issued either by the Ct. in wh. &c. or by a magistrate; as a justice of peace or a J. S. 105. St. C. 684. Secus at Ct.

c. d. w^d the subpoenaed is not bound to attend in civil

case unless a reasonable sum, to defray his expenses in going to
residing at & returning from the place of trial is tendered
to him, or unless he waives it. *Pear.* 192. *Sta.* 1150. *Phil.* 8

If after due service & tender of a reasonable sum for his ex-
penses, the deft. neglects to appear, he is liable either to an
action on the case for damages. (*Doug.* 540) - to an attacht,
or to an action on the Stat. 5 Eliz. in Eng? (It is however, an assump-
tious Stat.) for a penalty, & also for a "further recompense"
given by these stats. both to be recover'd by the party grieved. *Pear.*
192. *Doug.* 535 or 556. *Phil.* 4. 1 *Sta.* 510. 2 *St.* 810. 1054. 1150.
Cowp. 846. *Stat. C.* 685. 3 *Burr.* 1329. *Pro. C.* 522. *Comm.* 449.

In Eng? however the action for "further recompense" under the
Stat. 5 Eliz. will not lie, unless the amount has been previously
ascertained, by the Court of wh. the process issued. The
Stat. 5 Eliz. w^h apply after a judgment to the discretion of the Ct
out of wh. the process issues. *Phil.* 2. *Doug.* 535. Tho' this is
construed to mean the Court out of wh. not the Judge.
Doug. 535. 540. But the assumpment being made, debt will
lie for it. *Phil.* 2. *Doug.* 535. 601. In the Stat 5 Eliz. *Doug.* 535.

This and Abast does not obtain in *Comm.* The provisions of
our stat as to the "further recompense" being very different
from that of the Eng^h - providing for a recover^t by "action, bill,
pleaunt or inform^t." *Id.* *St. C.* 685.

But the more usual mode of
proceeding in *Comm.* is by attachment. *Phil.* 5. *Sta.* 1054. *Sec.* 108
under wh. the deft. may be fined for contempt & imprisoned
till he pays not only the fine but the damages sustained.

by the party. Sw. Ev. 108. Doug. 540.

In *Comer*? if a witness after
due service & tender [of his fare for travel some days attending
and], it is said. Sw. Ev. 108. Then are the sums to settle paid
suff? See Stat. C. 685. S. 6. "Such reasonable sum for costs
& charges &c" See also Eng rule Phil. 3. Pra. 192] requires
to appear; a capias may issue, to bring him before the Ct to
testify. But this proceeding is not more like the Eng^l attacht.
the means of procuring recompense to the party. The C. L
proceeding by attachment has not been in use here. tho there
is no legal impediment, it tends to its being introduced

The witness appears he is not in great obliged to testify, till the money
to wh. he is entitled is paid or tendered. Phil. 3. Pra. 192. 2 Stat.
1150. 13 East. 16 n. p. 1 Bl. R. 36. 1 H. Bl. 49. 3 Bl. C. 369. Tidd. 805

And if he attends according to the requisitions in the subpoena
Legis. &c. (We do not think the rule be the same, if he attends, whether
called to testify or not?) without any receipt or tender of money;
he may recover his expenses of the party for whom he was subpoenaed,
by action Pra. 192.

If a person wanted as a witness, is in
custody under lawful auct. or serving on board of a pub-
lic ship under an off^r. who refuses to allow his attendance
a subpoena being ineffectual, a process to compel attend^{ce}
is a writ of habe. corp ad testificandum. Pra. 192. 3 Phil. 9. Vent
396. Corp. 672 3 Burr. 1440.

If the witness wanted is a pris^r.
of war, the writ will not issue without the consent of the
executive govt. i. e. of a L. C. of State. Pra. 193. Phil 12 Doug. 449.

In such case however, he may by consent, be examined upon interrogatories, without being brought up.

So in Eng? if in custody on a charge of high treason. Pra. 193.

In criminal cases witnesses may be compelled to appear, either by subpoena, or by being bound in a recognizance to appear. If they refuse to enter into such recognizance they may be committed for a contempt. Phil. 7. 2 Hal. P. C. 281.

In civil cases the party accused of a crime is also entitled to a subpoena. For the provision in this part by the Eng. law, see Phill. 7. 2 Hal. P. C. 286. 17.

Persons who are bound to appear for the public without any previous tender of money for their expenses, by the law? There is no provision for reimbursing them. Phil. 8. It is now otherwise by Stat. 2 Geo. 2 c. 18 Sec. 3.

The person of a witness attending the trial of a cause is protected from arrest on civil process. Other protection covers the time of his going to attend and returning from the place of trial. Pra. 193. Phill. 5 c. 2 Sec. 2. 1113.

A subpoena is not necessary for his protection. If he attends upon a private request he is privileged. Phil. 5 c. 6. P. 536. Contra 6 Mass. Rep. 264. Phil. 5 c. 6. 7 Johns. 538. 1 Cases 115.

Laurens
The person of a witness attending from another state who has attended is not to be compelled. This privilege has been extended to

a party, attend an arbitrator under an order of C. S. D. Pra. 193.
Phil. 6.) 2 Johns. 294. Phil. 6. nia) Submit to arbit^{ors} with order of C. S. D.

A reasonable time is al-
lowed him for going to the place of trial & returning. In
determining what is a reasonable time the practice of the
Ct. is liberal. Pra. 193. Phil. 6. 2 Bl. D. 1113. Sta. 986. 13 East
11 n (a) 2u 4 Dall. 329.

If arrested in viola of his privilege
the Ct. on wh. he is attending will on motion discharge him
Pra. 193. by habe. corp.

The usual practice in Cent. is to obtain a written pro-
tection from the C. S. But this is unnecessary. the convenience of
furnishing w^o of y^e privilege to officers.

When a material
w. arrives abroad he may under an order of the superior vaca-
tion of a Judge be examined de bene esse upon interrogatories,
before Commissioners; but this it seems is not done without the consent
of both parties. Phil. 17. 172. 3. Pra. 60. 2 Tidd 812 for Com. Ex. report

So if such w^o is about to leave the country, he
should if at the time of trial the w. has left the country, or is out
of it, the depositions taken may be read in w^o. Phil. 272. 2u 671.
1 Campb. 172. 6 Esp. 92. 1 Johns. 6u. 103. 147. Second if he is in
the country at the time of trial. Phil. 172.

If the opposite party will
not consent to the examination, the Ct. will put off the trial, (that is, if
party applying may file a bill in Eq^t as before mentioned)
until consent is obtained, or the w. comes into the country
Phil. 10. 2u 671. 2u 674. 1 Bos. & C. 211

But this will not be done to enable the party to set up an odious defence: as that the Plff is his slave, or an alien enemy &c. *Dist. N. 1 Bos Lc. 254.*

In general depositions are not by the C. L. as matters of right, admitted as ev^{ts} in Ct. of law. *see in Ct.*

First by the Stat. law of Court whenever a person whose testimony is needed in a cause depending, is bound on a voyage to sea - or about to depart from the State - or resides more than 20 miles from the place of trial, or is confined in goal or any legal process - or by age or sickness or bodily infirmity is unable to attend the trial, his dep^t may be taken out of Ct. by any a'sistant or justice of the peace - notice being first given to the adverse party as the Stat. directs. (The dep^t of a woman residing within 20 miles of the Ct. but having a child sick & in a condition not to be left by her, has been adjudged admissi- ble. *1 Rost. 76*) *H. C. 684* [1. 685] 6 By U.S. law. notice must be given if party is within 90 miles.

And perjury is assignable upon a depo. thus taken, as upon testimony given *viva voce*, in Ct. *St. Con 548.*

As to the mode of notice & authentication the depo. see *H. Con 684. Lu. Ev. 112-3.*

If a depo. is written by the party for whom it is taken, or his att^y, it is inadmissible in ev^{ts}. and the copy by a third person, the copy is admissible. *Lu. Ev. 113*

Subscribing witnesses to a will may be sworn before an a'st^t or justice of peace - att^{est}ments entered on the back of the will, is in Ct. as w^{ch} *H. C. 685* [8. *Lu. 112.*

ch. w^d. in Con^t is compellable, by subpoena, to appear & depose under our Stat. And if after tender of money - he neglects to obey, the subpoenaer is liable to the same penalty as for neglecting to appear at the trial of a cause. Stat. c. 685, b. Sec. 6, 113.

ch. depo. is not inadmissible merely because it was sworn before a party's attorney. Sec. 6, 114.

ch. depo. given in a particular case, by a person who afterwards dies or cannot be found or brot. before the ch. may be used to the same point in a diff. ca. between the same parties. Sec. 6, 114.

Dep^os are not admissible under our Stat in cases merely criminal; but, by the construction given to the act, they are admissible in quietum proceedings in wh. no crim^l penalty can be inflicted. See prose^o upon the Stat of bastardy. Sec. 2, 114. & Sec. 6, 114. See Par.^o & Ch.^o & Root. 307. 154.

Depos. taken before justices of peace in other states, in the manner prescribed by our Stat, are admissible here - even tho by the laws of such other state, justices are not authorized to take depos. at all. Sec. 6, 114. And Depos. taken in a foreign state, according to the laws of such state have been held admissible here. Sec. 114. See Rev.

Our Sup^r & Co. Cts are respectively empowered to issue commissions for taking depos. abroad in a cause depending before them respectively: & in vac^a the same power may be exercised by either Judge of the Sup^r C^t & by the Judge of the Co C^t & Stat Com. 49. Sec. 6, 115. See also

Before a depo. is taken, notice must be given to the adverse party or to his known agent or atty. to attend if he thinks fit, if either of them resides within 20 miles of the place of caption. Act C. 684. Lu. E. 112. 1 Rost. 346. 480. 574.

The notification is a writing usually signed by a magistrate & must be delivered to the party, his agent &c. or a copy left at the place of his usual abode. Act C. 684. Lu. E. 112.

Same rule of notice holds, as to depositions taken out of the state. & also as to those taken in the state, for a party living out of it - In either case (as well as where both parties reside in the state) - if the adverse party, tho' residing more than 20 miles from the place of caption, has a known agent or atty. residing within 20 miles, the latter must be served with notice. Lu. E. 113. Kirk. 1

Vouchers in ex. et. and depositions are entitled to the same notice, as the orig. parties in other actions. 2 Rost. 25.

In genl. the distance contemplated in the rule, is between the residence of the deponent & that of the adverse party. But tho' that distance is less than 20 miles, yet if the depo. is taken, when the deponent is absent from home, & more than 20 miles distant from the adverse party - for a reasonable cause, & no unfairness appears, the notice has been dispensed with. Kirk. 219. 283.

If several are joined in a writ, a depo. can be used only ag^t such of them as have been notified, when notice is necessary according to the foregoing rules. Lu. E. 113. Kirk. 100.

When a depo. is taken during the

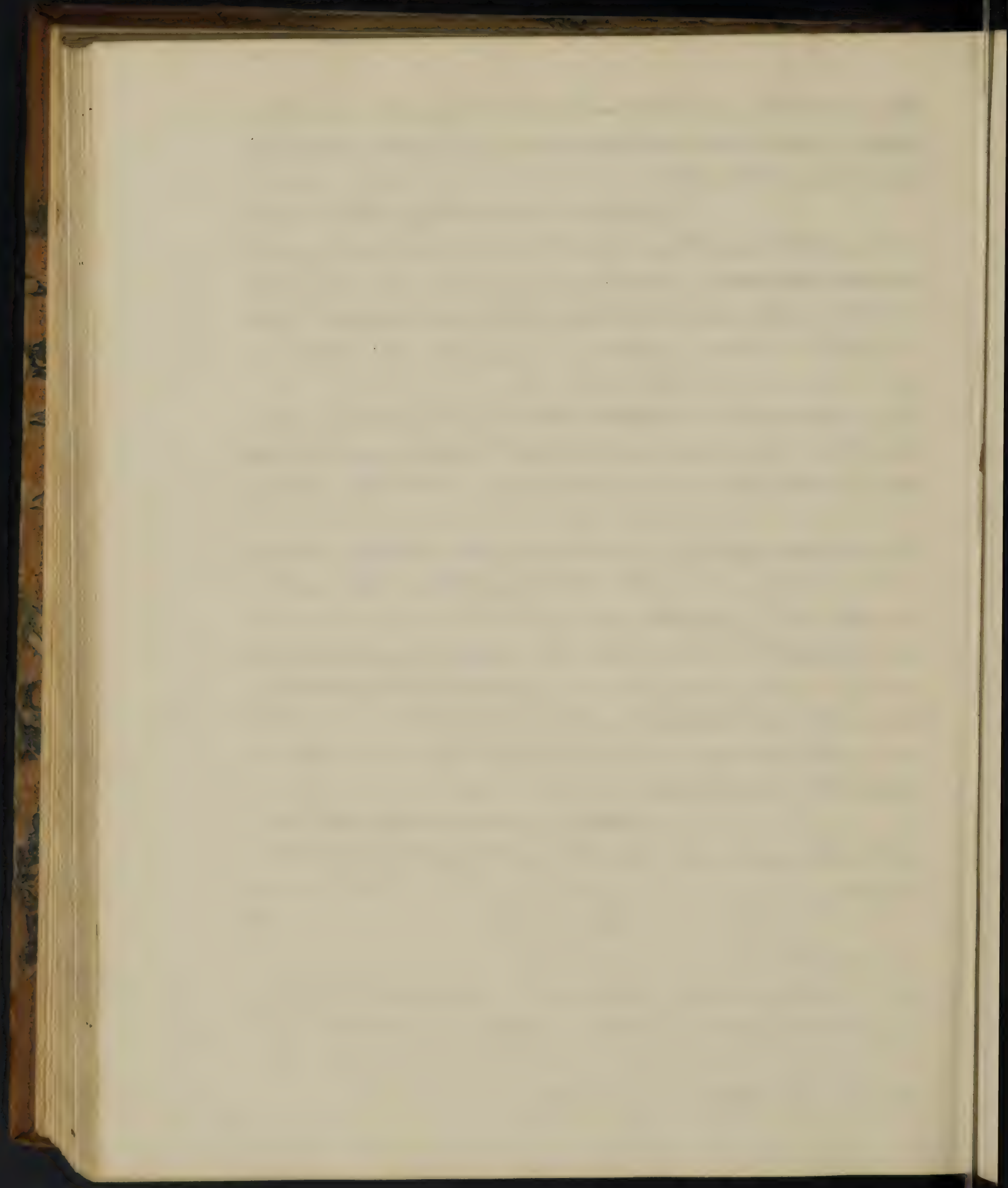
time of the Ct. in wh. the cause is depending, it is usual to give notice in Ct. But this does not dispense with notice in y^e usual mode. *Law E. 113.*

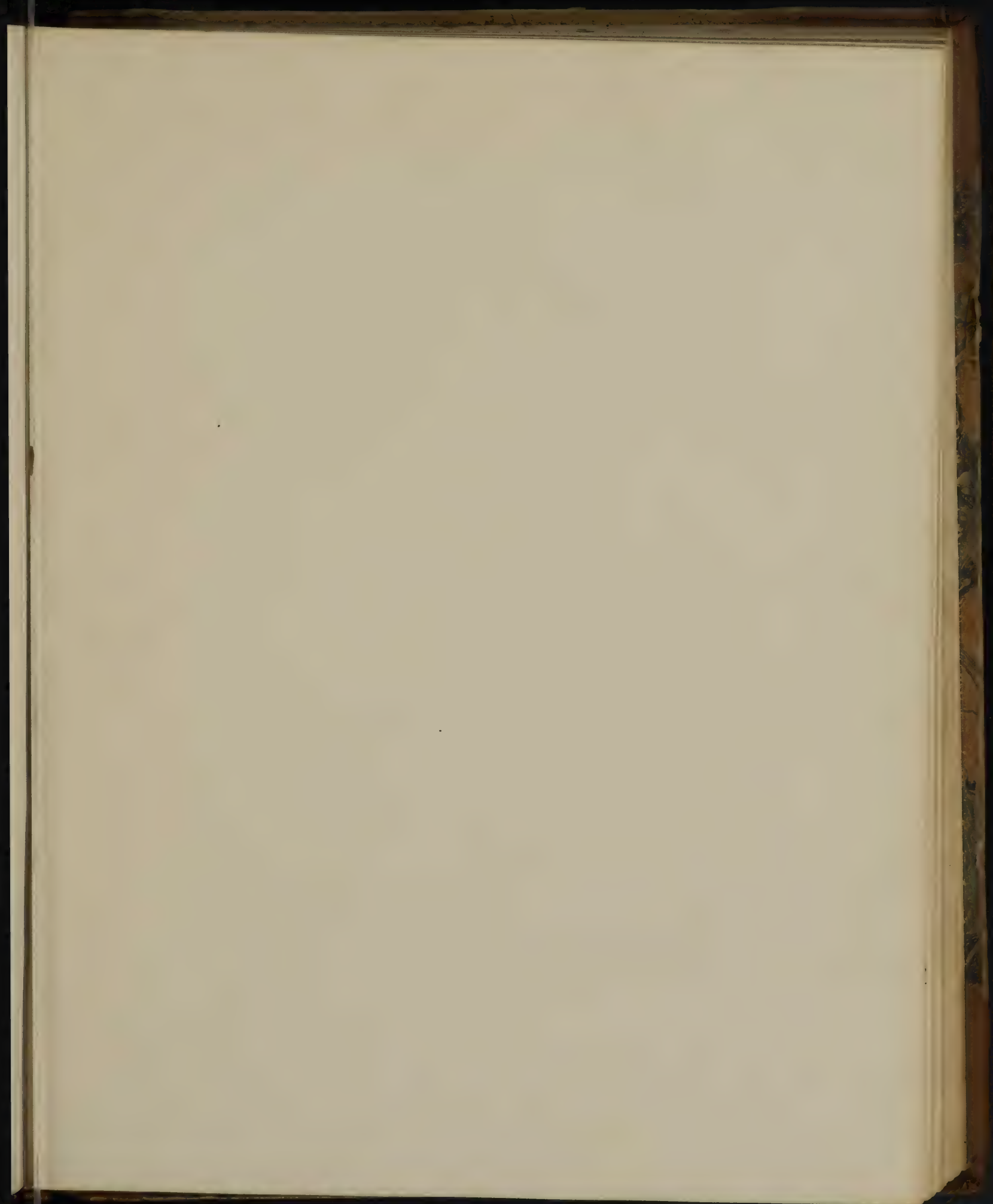
Deposits of subscribing witness to bonds doth not require inst^y - wth "acc^{ts} or testimonies, relating to, persons out of this State, or to be sent beyond sea" may by a special exception in the Stat, be taken without such notice. *Stat. C. 684 §. 5.* Is this exception ever regarded in practice?

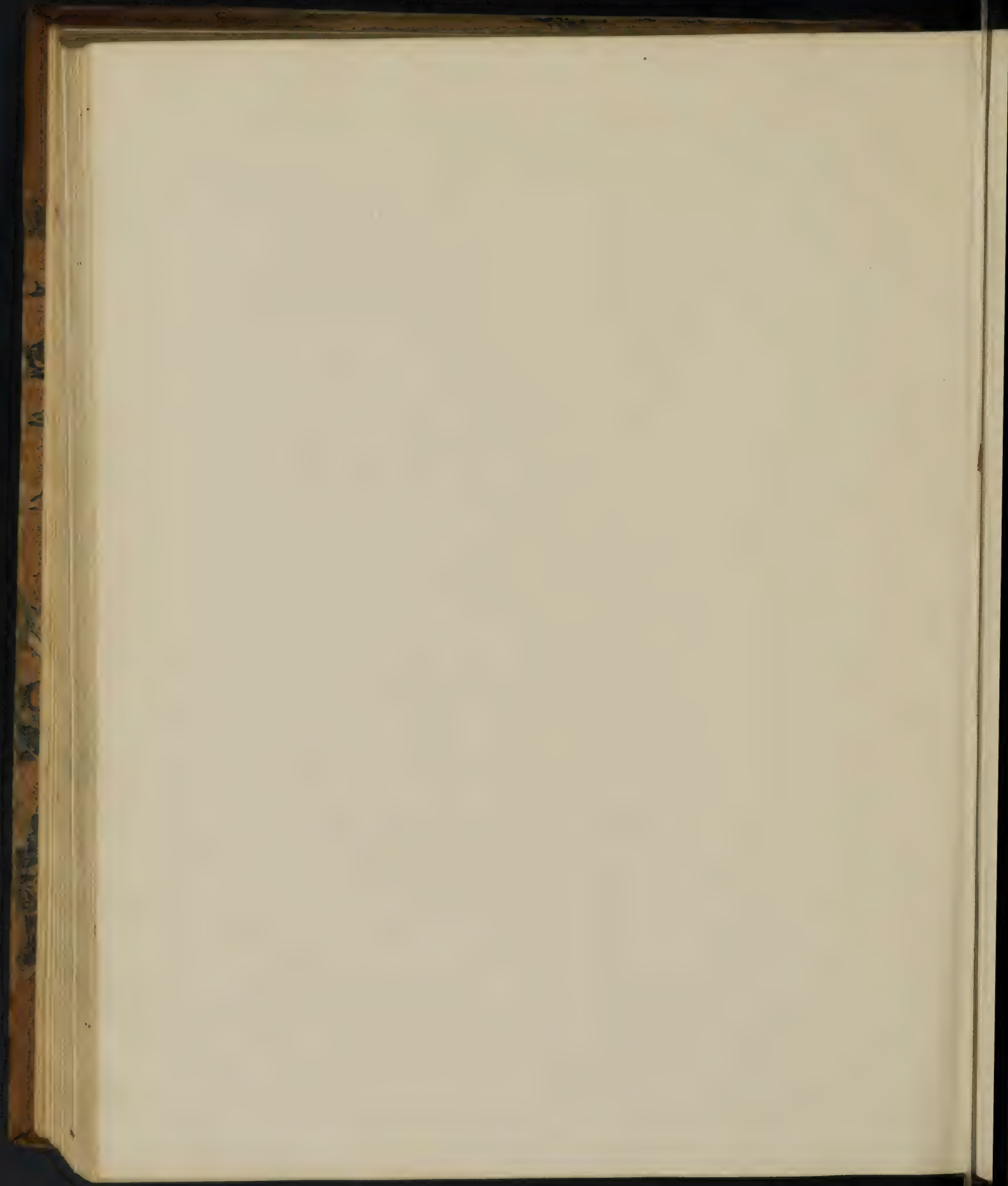
Every depo. is to be adduced to the Ct. in wh. y^e cause is depending - & unless delivered to the Ct. by the magistrate himself who takes it, must be sealed by him. *St. C. 684. Law E. 113.*

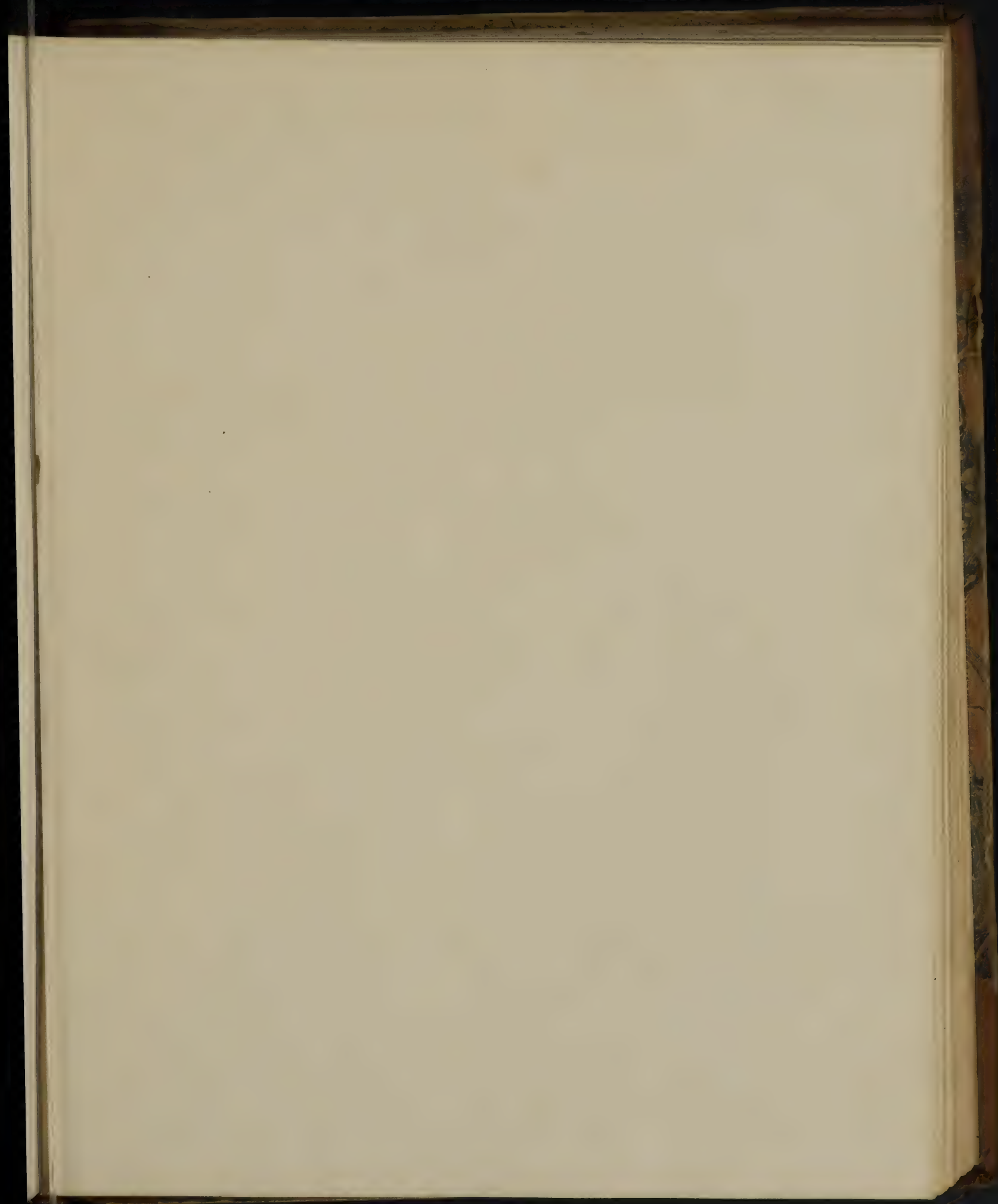
The certificate of the magistrate, who takes the depo. as to the fact of notice given - the distance of the place of caption from the Ct. - y^e of the above party witness from the place of caption - & as to the reason of taking a depo. within 20 miles of the place of trial - is *prima facie* ev^{ce} of those facts. but not conclusive. The opposite party may therefore deny the facts; & upon his disproving them the depo. may be rejected. *Law E. 114.*

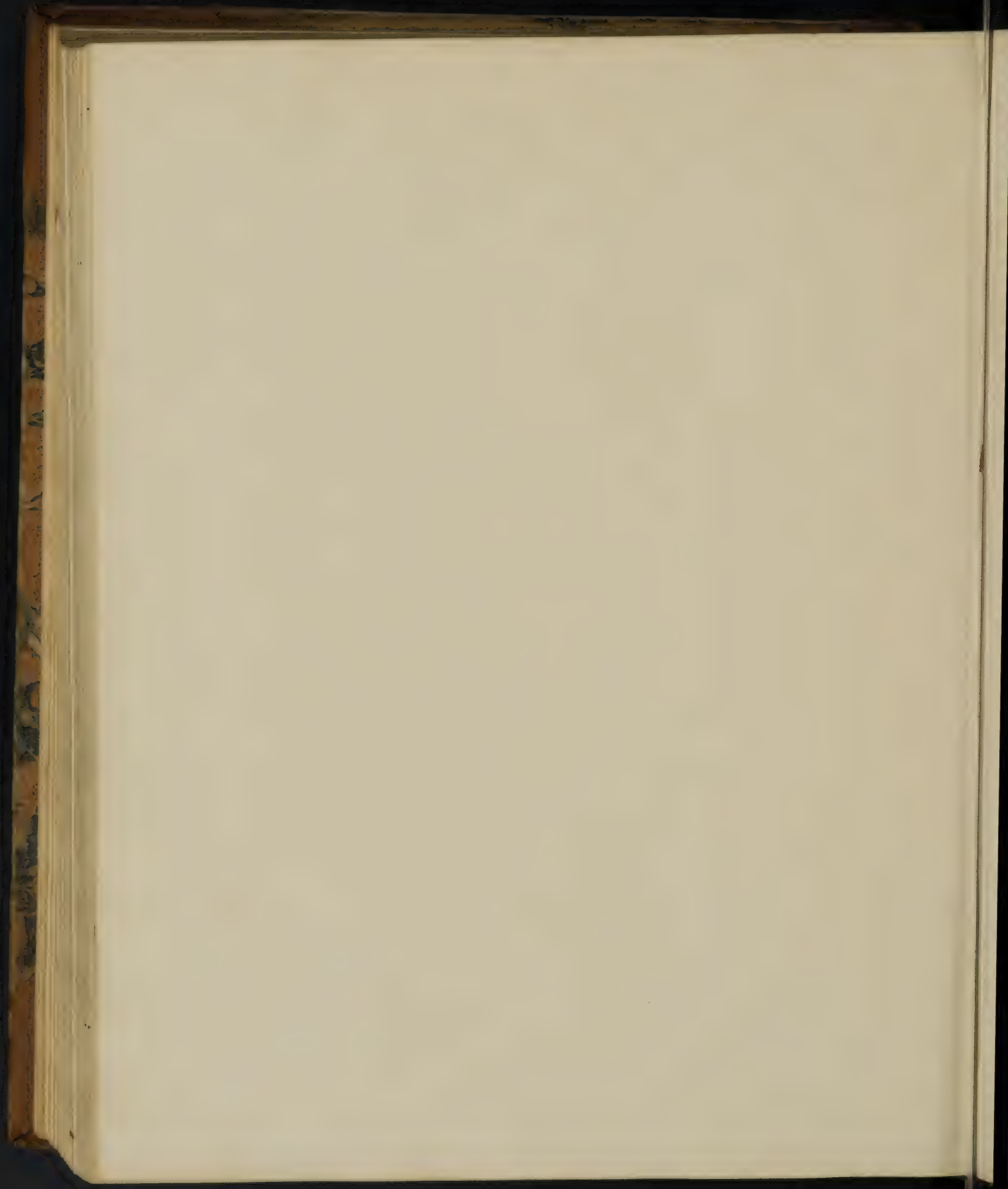
If there is no such certificate, the party offering the depo. may make them out by proof. *Law E. 114.*

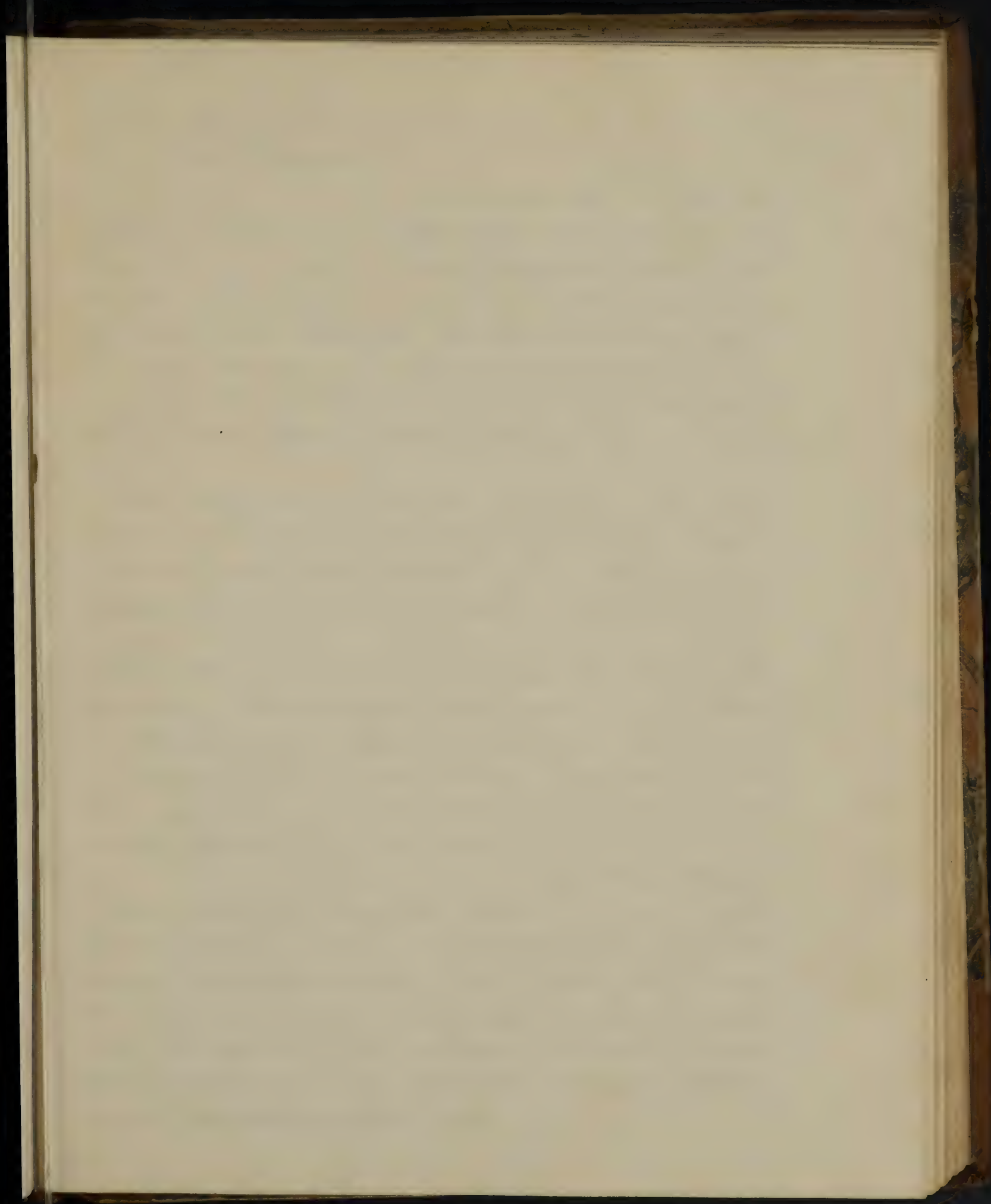


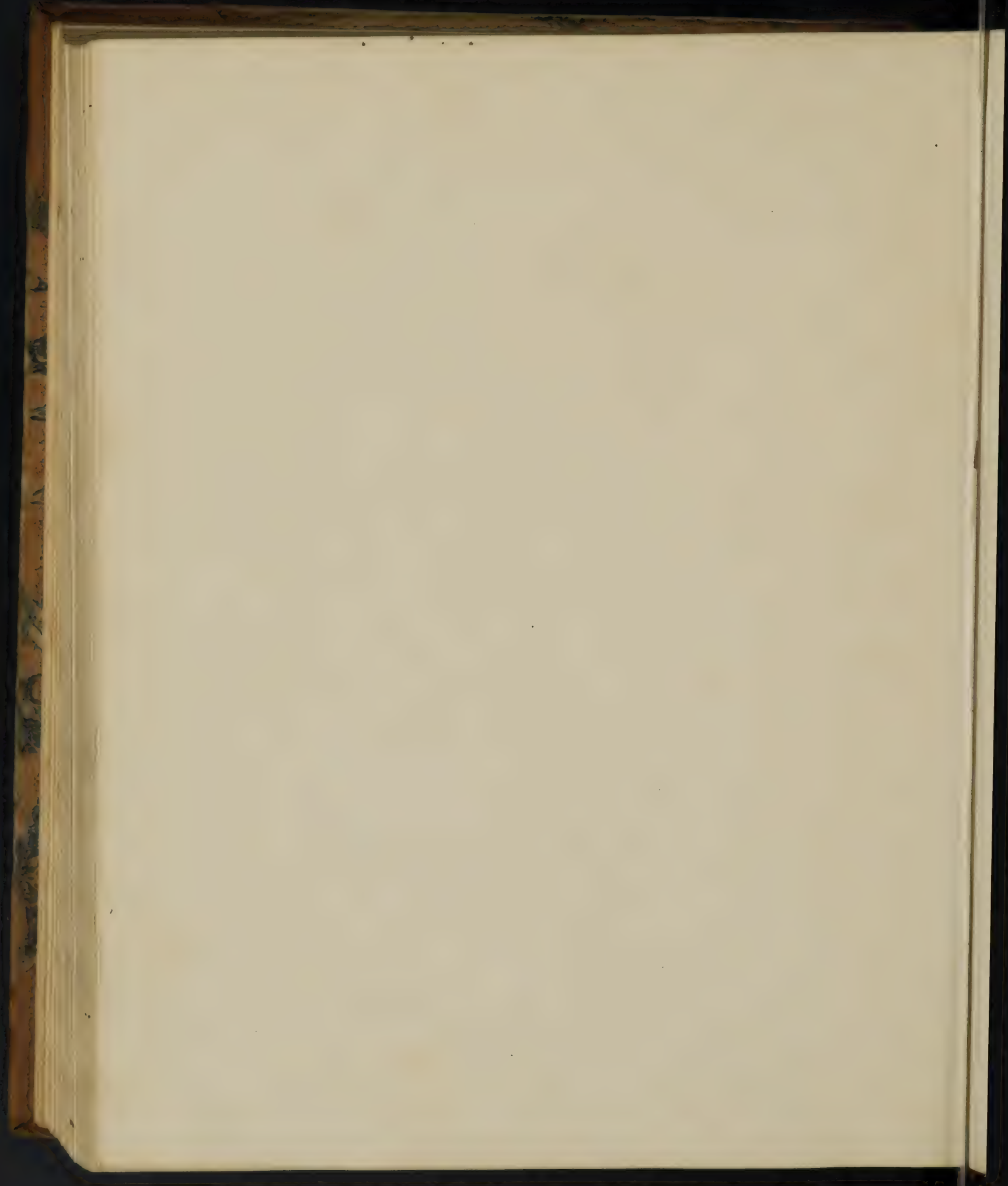












Slander.

See also
the 1st 2

Slander consists in maliciously defaming a person, 1st By words written or spoken, which tend to injure him in point of personal security, convictions, office, profession or interest. 4 Bac. 483. 4 Co. 14 Bul. 9. 3 Bl. 123. Esp. 496. 2^d without words as by figures &c of the above tendency. Esp. 496. 3 Bl. 125. 5 Co. 125. b.

Committed according to the usual division in three ways, 1 By words. 2 By writing, 3 By pictures, signs &c.

Slander by words is of two kinds, 1st By words in themselves actionable. 2 By words not actionable in themselves but becoming so &c. 4 Bac. 483. 94. The genl. rules applying to oral slander apply to written. 4 Co. 14.

Oral. Falsity & malice must concur to constitute diffⁿ. Malice. A truth spoken with malice, or an untruth without malice, will not support an action.

Malice is an improper motive, or a wanton disregard to our fellow mortals; it is not necessarily accompanied with a spirit of ill will or revenge. —

Genl. rule. That for words in themselves actionable. Plff may recover on merely proving the words (some exceptions) for damage is implied & such words prima facie import malice: but this presumption of malice may be rebutted by proving the words to have been spoken under circumstances which exclude the inference of malice. (Holt) 4 Bac. 483. Bul. 6. 1 T. Rep 11. argued & asserted to be 2^d from, p. 10? —

Clasps of actionable words: 1st Those which bring the person of whom they are spoken into danger of legal punishment. Finch. 185. 2^d Tending to exclude from society. 3^d Injurious to one in his trade or profession. 4th Tending to injure one in his office. 3 Bl. 123. 4 Bac. 483. 93.

1st Bringing into danger of legal punishment. If the false words charge with a fact which w^d incur corporal punishment, then words are clearly actionable. Ex. charging Treason, felony, perjury &c. 2 Co. 15. 20. 4 Bac. 483. Cro. E. 602. 9. 38. Cro. Jac. 114. 1 Roll. 63. 5. 6. 49. 77. 1 Wils. 177. 86.

According to this classification words may be actionable per se tho' they do not injure one's reputation. & they may injure his reputation without being actionable. Words charging a person with what w^d subject him to transportation - actionable. 4 Bac. 486. As to castrating. 4 Bac. 486. pl. 45. 1 Roll. 36. Words charging what w^d subject to imprisonment are actionable - corp^r punishment. 1 Bern. 179. 1 Roll. 46. 6. 15. 38. Salk 694. 2 Vint. 266. 4 Bac. 486. 7. Comb. 137. Cro. Car. 315. Finch 185. 1 Freeman 26. Salk. 696. 4 Bac. 487. 3 Wils. 186 contra.

The Stat. 18 Ed. mentioned in Salk subjects to imprisonment, if the Bastard is chargeable to the Parish. - Words charging what w^d subject to a fine are actionable or not as the fact charged is infamous or not. So decided by S. C. of Bern^d. There is then any such rule in Eng. 4 Bl. 168. Case of Bawdy house 4 Bac. 487. 8. pl. 50. 60. To charge one with any crime which makes the person spoken of liable to prosecution is actionable. Esp. 497. cites Finch 2. 186. See case of minor trustees.

4 Bac. 485 pl. 27. Sid. 104. Cro. Jac. 39.

Words charging what
w^d subject to punishment must - to be actionable charge a
criminal fact committed - charging evil intentions not
suff^t Sid. 573. 1 Roll. 23. 51. 1 Com. 191. Esp. 496. Ex. "he
"gave I.S. counsel to kill our &c" not actionable 4 Co. 16. b.
So "I expect to see him indicted for stealing" not suff^t
Hutt. 18. "So he is in goal for stealing a horse" not suff^t
Hutt. 2. Esp. 497. In - For words of a similar import
holders suff^t after verdict. 2 Wils. 306. 300

Adjection words upon
this head are actionable or not as they presuppose an act com-
mitted or not. Ex. "seditious" "thievish" "traitorous" &c. not suff^t
"perjured" is suff^t 4 Co. 18. b. 19. a.

"His forsworn" not actionable
unless it be added "in a judicial proceeding" or "in such a
court" 4 Bac. 484. 4 Co. 15. Cro. Ely. 609. 2 Lew. 166. To call
one a "thief" after giv^t pardon is actionable - pardon clears
from guilt. Esp. 497. Hob. 84. 4 Bac. 516. 487. pl. 52. 3.
Ray. 23. So if the particular theft had been par-
doned.

So charging one with having committed a crime of
which he has been acquitted. 4 Bac. 487. pl. 52. Cro. 156.
There is no danger of punishment.

After words charge a crime
wh. it appears could not have been committed, they are not ac-
tionable. Ex. "he has killed I.S." I.S. being still alive. Esp. 498
4 Co. 16. a. Bul. 5. But this may be pleaded in Eng. - cannot
given in evidence except in mitigation of damages. Bul.
5. Judge Rivers thinks that in such case an

argument of *J.S. death* is unnecessary, apprehending his death to be immaterial. Because it is not always the case that those who are punished for a crime are guilty of its commission. -

If to the words charging a crime, a description be added not corresponding with the crime charged, the words are not actionable. Ex. calling an a thief because he had committed a certain act which amounts only to trespass. 4 Bac. 510. 85. pl. 27. 8. Sid. 104. 1 Roll. 51. Cro. 2674. 4 Co. 13. 4. 19 a. Esp. 511. 7. Bull. 5. N. Rep. 335.

But changing a crime *de*, tho its prosecution is barred by the state of limitations, at the time of the words spoken is actionable. *Wells v Fitch* Sup. 6th 6th '93.

If words in themselves actionable consist of an innocent meaning it lies on the *def* to show that they were used in that sense. *Peak v B* Ca. 4 note.

If the punishment of the crime charged, is in the alternative, the words are actionable if the punishment may be corporal, &c. Ex. charging an with being the father a mother of a bastard which has been chargeable &c. at sup. (on the parish) For the father he is not liable to imprisonment unless he disobeys the order of the justices. 1 Bac 317. 4 ib. 486. 7. pl. 57. Cro. Car. 315. Sel. 694.

2^d *in* *standing to exclude from society* &c. as to charge him with having a contagious disease. Esp. 498. 3 M. 123. Cro. 2^d 144. 1 Roll. 44. Hob. 219. 1 Lev. 205. 4 Co. 17. a. 4 Bac. 438. 1 Com. 184. But the words to be actionable unless the

had must change a present disease. 2 Stra. 1189. 2 T.R. 473.
Clim secur. law. Elj. 214. Cro. Jac. 430.

Under this had adjectiv words in the present
time an actionab. 14 Mod. 248. Bac. 488. Cro Jac. 144.

3^d Tending to injure one in his profession or trade.
4 Bac. 490. 1 Com. 182. Esp. 498. Es. calling a lawyer
"a knave" actionab. 3 M. 123. Finch L. 186. 1 Roll. 126.
35. 53. 65. 15. 52. 4. 1 Com. 182. 2 Vent. 28. So "he has re-
valed his clients secrets" - "he is no lawyer" "no more
a lawyer than the devil" (a affidavit dilly) action-
able in Kib. nunt. a P. Ray. 1 Roll. 54. 3 M. 59. Sid. 327.
So "he will overthrow his clients cause" Cro. Elj. 589. She
cannot read a dictⁿ 1 Lev. 297. So in gen^l chan-
ging a lawyer with ignorance in his profession. it. auct. &
4 Bac. 491. 2. 1 Com. 182. Cro Elj. 382. a 278.

In these cases
the lawyer must state in his dictⁿ that at the time of the
words spoken, he was a practising lawyer. Styles 231.
4 Bac. 491. 2 Vent. 28. Poph. 207. 4 T. Rep. 366. 'proof of
Poph acting as a lawyer suff^{ic} 2 Ch. Mally. 487.

So falsely calling a trader "Bankrupt" is actionab.
"he is a bankrupt knave". - "he will be a bankrupt in two
days" 4 Co. 19. a. 2 Stra. 762. Esp. 499. 1 Com. 183. 4 Bac. 698.
Sid. 299. Carth. 330. 1 Roll 61. So to charge him
with cheating his customers & advise not to deal with
him. 4 Bac. 493. 2 Lev. 62. Ray. 1480. 1 Com. 183. Bun.
1688.

In actions by traders men in these cases it must appear

by laying colloquium or otherwise, that the words were not
linked with reference to his trade. 4 Bac. 492. Salk 694
1169. 5 Mod. 398. T. Ray? 61. 169. 2 Ray? 1417. Ex. "he is a
'cheat'" him a colloquium concerning his trade is in equity
to be laid. But if the words were, "he is a bankrupt" it
w^d be suff^{er} (verb.) merely to show he was a trader,
1 Sw. 115. 250. 4 Bac. 492. 2 Sw. 62. "Do not deal with
him he is a cheat" good without coll.

In Eng. to charge a
blaggard with practising his is actionable, 3 Sw. 17. 1 Com.
181. 1 Roll. 58. 136. To call him a "drunkard" 4 Bac
490. All. 63. Comt. 253. Sta. 946. calling him a rogue
I am old was call &c. vide note

To call a Physician a "quack"
is actionable. To say he has killed a patient sh^d not
be actionable. Cro E. 620. unless it be added "knowingly"
"wilfully" or the like - Sw. as it supposes ignorance in
his profession 4 Bac. 491. Vid. 1 Mod. 221. when the same
words s^d of an Apothecary were judged actionable -

So words tending to injure a mechanick
in his trade are actionable. 4 Bac. 491. 4 Sta. 898.

4th Tending to injure one in his office. Charges
charging one in an office of profit with want of a-
bility or integrity, are actionable, 4 Bac. 488. Esp. 500
2 Ray. 1296. 1 Com. 180. Salk 695. 1 Roll. 65.

But words charging a person in an office
of trust or honour, not of profit with want of ability
are not actionable. 4 Bac. 488. pl. 73. 489. Salk 695.
Secus if they impeach his integrity. Sta. 617. Ray. 1289.

4 Co. 16. a. Hob. 40 "Butt made Justice" not actionable
Salk 695.

(Judge Rive denies the correctness of this distinction between offices of profit & those of trust & honour, and cites Hardwick, aphorisms contra. "If there is any ground of difference" he observes "it must be that words spoken of a man in an office of profit more frequently bear upon him in his official capacity" The case in Salk was decided correctly not because of the distinction referred to, but because the words appeared not to have been directed at the Diff in his official character. The only true distinction says J. Rive, in these cases, is the relation the words bear to the diff's capacities, individual & official.)—

Charging a person in office in either case with inclinations & principles which disqualify—suff? without charging any act. Bul. 5.

When the words spoken do not of themselves import to have been spoken with reference to Diff's official character a colloquium is necessary. Ray. 1369. Stra. 618. 4 Co. c. 489. pl. 88. 488. pl. 74. 1 Lev. 280. Less if the words themselves do import a reference to de. de. lev. Jac. 557. Ex. "He is a knavish justice"

So genl^y when the words are not actionable except as they refer to some collateral thing which constitutes the ground of action & to which the words themselves do not upon the face of them refer, an averment of a coll. is necessary. 5 Allod. 398. 2 Saunders. 307. Esp. 501. Sta. 1169.

Salk. said by Esp. 514 to be necessary when a trader is

called a *Burlesque*. In many cited by Esp. *David* 1 *Lev*. 280
when the words were "he is a fourworn justice" & coll. *Holden*
unincapary. 4 *Bac*. 515. *pl*. 55. 1 *Roll* 54. *lex bar*. 270. 193
calling a physician "no scholar" 2 *Lev*. 62. saying of a
tradesman "He is a cheat do not deal with him" *Ray*?
1480. He is a knave compounded &c. *id* *Lev*. -

The words
do not themselves show their own application by designa-
ting in *prop* terms the subject matter or the person
intended an *incapary* Ex. "He" meaning the *Piffe*.
4 *Co*. 17. b. *Rule*. Nothing which we otherwise re-
main uncertain can be reduced to certainty by an
intended. 4 *Bac*. 516. 4 *Co*. 17. b. More accurately
anything which taken in connexion with all that
passed before between the parties as to the conversation
still remains uncertain cannot be made certain
by an intended. It can only be made certain by
a reference to something said before which is certain
4 *Co*. 17. b. 1 *Roll* 73. *Comp* 684.

An intended therefore can
never extend the meaning of the words beyond their
proper import Ex. "I burnt my barn" meaning a
barn full of corn. intended not good. But if it
had been agreed that *Sept* had a barn full of corn
& that in discourse about that barn *Sept* had spoken
the above words - intended good. *Comp*. 684. 275. *Esp*.
511. 4 *Co*. 20. a. *lex* *Ely*. 834. So "He stole half an acre
of my corn" intended "the corn which grew on
half an acre after it was reaped" *bad*. *lex* 428.
1 *Roll*. 82. *pl*. 1. *Comp* 684.

When an innuendo is unnecessary a bad one is sur-
plusage Ex. "He was perjured" innuendo in a certain
bill exhibited in such a court. innuendo bad - but decⁿ
is good. 4 Bac. 516. 1 Roll. 83. Cro. Car. 609.

So if the person
is uncertain from the words published an innuendo can
not make it certain. Ex. "One of the serv^{ts} of Jd. is a
thief." innuendo the Plff not good. Esp 511. 4 Co. 17. b.
1 Sid. 52. Cro. Elj. 497. Hob. 2. 45.

When an acⁿ is brought
for de. "tending to injure in trade profession officer &c"
it must appear in the de^c that the Plff was, at the
time of the words spoken of such a trade &c. Esp. 514
Hutt. 49. That "Plff has been a merchant trader for
many years past" not suff^t (Cro. Elj. 794. no judg^t) Cro
Jac. 205. Cro. contra. 4 Bac. 513. Cro. Elj. 273. Cro Jac. 222
Cro. Car. 282. Yelo. 159. 1 Sid. 425 & that he shall be presumed
to have been at the time a trader.

So in case of a trader that "he gained his living
by buying & selling" necessary Esp. 515. 1 Sid. 299.

Esp 520. when words of heat & passion said not
to be actionable. sic vide 4 Bac 522. 1 Lev. 29. 3 Bl. 125.
Rule. when they import no definite charge - as "Rogue
rascal &c" So perhaps when wantonly provoked by Plff
says if Def^t in a paroxysm of unprovoked rage utters ac-
tionable words. 2 Ct. Rep 335. actions of slander an-
tiently rare - afterwards frequent & mitiori rule adopted
H. 21 Jac. revision.

Rule of construing words in mitiori sense now
abolished - They are to be taken in that sense in wh. they

would naturally be understood by many. Esp. 511. 4 Mac. 497.
Courp. 688. 275. 4 Mac. 505. Bul. 4. 10 Mod. 198. Tilt. 12.
Peake et. R. 4. n. 2 Mod. 159. 5 East. 263. Selw. et. R. 161

When words in themselves actionable admit of an innocent meaning: it is an duty to show they were used in that sense
Peake. 4 et. R. 335. 1 Yig. 507. 1 Johns. 279. 3 ib. 180. Anwer
in such case inquired of "how he understood them" sent.

Stenacious words in a foreign language actionable if understood
by any of the jurors. Secus ut. 4 Mac. 498. 1 Roll 74. Bro. 6865
Hob. 126.

All the sense is to be taken together. Esp. 511. For
the subsequent words may explain the former so as to
fall short of slander (as in case of description and such) ut
supra. 4 Co. 19. a. Bul. 4. 2 Mod. 159.

Courts will not do violence
to language to find an innocent meaning. Esp 512
Ex. "your husband said of a wound you gave him" suff.
tho the wound might have been given by accident.
Gilt. R. 243. Bul. 4

So a forced construction will not be given
to make words actionable which bear an innocent mean-
ing. Esp. 512. "He is a common maintainer of riots" of
a house. Hob. 117.

Genl. Rule. The words must, to be actionable
import a direct charge of a slanderous nature: not by
inference. Esp 512. Ex. "I got his name by swearing &
fornicating. 4 Co. 15. a.

Yet when the intent to charge a crime

for any thing else of wh. the charge is actionable is clear, the words are actionable tho somewhat indirect. Esp. 512. Bul. 4
1 Com. 85. Ex. I. I will make you an example for a purposed
"Kecur." Roll 49. l. 45. Rylo. 160. "I will prove that he poisoned
A." 1 Com. 185. 1 Roll 50. 61. 5. 6 w. E. 569. 1 Lide. 381. 1 Vert
276. "When will you return the sheep you have stolen"
actionable. 1 Com. 186. 1 Roll 48. 2 il. 165. 12 Co. 134.

In declaring it is usual to state falsely & maliciously, &c
maliciously seems not necessary. 1 Com. 196. 2 Bac. 512. p. 8
1 Hb. 273. Moy. 35. Qw. 51. 2w If the words are not in them-
selves actionable? for malice is *prima facie* implied -
a direct avowment that the words are false not necessary
falsely published suff. Esp. 516. Bull. 8

Dec^m usually states
that P^d is of good fame &c. 1 Com. 195 not necessary - alleging
the words were spoken "openly & publicly" suff. without saying
"in the hearing &c." So "in the presence of divers persons" suff.
2 Bac. 512. Co. E. 861. 486. Moy. 87

Tho gen^l actionable words
prima facie imply malice the presumption may by cir-
cumstances be rebutted - Ex. case of confidential commu-
nication which excludes the probability of malice - as
character of a serv^t given by a former master on rea-
sonable enquiry - the false, malice must be proved. 4 Bur.
2422. 1 T. Rep. 100. Bul. 8. Co. Jac. 91. 4 Co. 91. Esp. D. 512. 3
5 Esp. 110. n. 3 B. & P. 587. 7 East. 493

Words are confi-
dentially the case of warning P of a trader "He will be a
bankrupt soon" not actionable tho special damage was

stated. Esp. 503. But. 8. 3 T. Rep. 60. 1. and.

So if the words were
used in a course of legal proceeding. Ex. allegations in
articles of the peace to bind Deft to his good behaviour
Esp. 503. seems if the count applied to has no jurisdiction
of the matters charged. 4 Co. 14. b. E. 230. Case of withers.

The relating of slander fabricated by another gent.
actionable. Esp. 517. But. 10. Seem if the truly
names his author at the time. 12 Co. 133. 4. b. E.
E. 400. 3 But. 225. 7 T. Rep. 17. 2 East. 426.

But cir-
cumstances are carefully to be regarded, as to the
intent. 4 Bac. 498. Ex. when one in the spirit of con-
cern said "I have heard that J. D. was hanged for stealing"
action lies not. 1 Lew. 182. 4 Co. 14. But. 9. 10.

Diff. sus-
picion no justification Esp. 518. 6 Co. 60. 38.

Words uttered by, raising or provoking
questions by Diff. himself not actionable. 4 Bac. 498
20. Car. 297. Ex. Can you say I am hanged. "yes
if you will have it."

The gent. issue is in Eng. either a denial
that Deft spoke the words or that they are actionable, for
want of malice, as in case of confidential commu-
nication (see supra) 6 T. Rep. 110. But. 8. Esp. 503. 17.
1 Lew. 82.

The gent. character of Diff. as to the crime charged
by the words may be proved in mitigation of damages
1 Root 354. 450. But other particular acts

the same kind as those charged cannot when the charge is of particular acts. *Attwood v. Lister* 1807. 1 B. & C. 296. Peake E. 2. 6. Even when the charge is genl.

In Eng a special justifiⁿ cannot be given in evidence under the genl. issue: it may in Conn. Esp. 500. Ex that the words were true. 4 Co. 16. Stra. 1200. Doug. 378. In Eng the truth of the words cannot be given in evidence even in mitigation of damages Esp. 518. But. 8. 2 can cited contra. The truth of the words is always a good justification. 4 Bae. 516. 1 Roll. 87.

So sometimes Def^t may justifi^e, tho the words are in themselves actionable & false as when false words are published in a court of justice in a declⁿ or count brought by Def^t or Plff. 4 Bae. 699. 518. 1 Com. 196. Esp. 503. 4 Co. 14. b. 14. E. 230. 48. Hob. 82. Hutt. 113. 1 Roll. 43.

But if Plff charges crimes not cognizable by the jurisdiction to wh. he actually asgt^s him. not justified. Esp. 503. 4 Co. 14. b. Hob. 206. 67. 1 Roll. 34. 1 Com. 194.

So the person charged in such declⁿ or articles of complaint (tho they were exhibited under oath) may justify saying. they are all false - tho they are true. for this is his defence in a ct of justice. 4 Bae. 499. 518. 1 Roll. 87. So he may say a witness is perjured by way of objection to his admission. 1 Com. 194. 1 Roll. 33.

Has always words in a complaint to a grand juror or proper magistrate or in an in-

disturbance, not actionable, 2 Bai, 499. Cro Car 247. 3 Lw. 198
4 Co. 14. Hob. 82.

Tho if one falsely & maliciously & without prob-
able cause exhibits or complaint. i.e. action for malicious
prosecution will lie. 4 Bac. 500.

So in genl. in the above cases of
complaint if the course of justice is made a mere
cloud for malice action for malicious prosecⁿ lies.
4 Bac. 500. 3 Bl. 126. Fitch L. 905. F. & T. 116. Qu. as ag^t
grand jurors?

So slanderous words spoken by a witness in a
C^t genl. not actionable. 4 Bac. 499. 518. Cro E. 230. But he is
liable as the case may be for perjury. Secus if he goes beyond
the issue & slanders a third person. Esp. 504. 4 Co. 14.

Suppose that he so slanders a party, no remedy?

So if one witness in testifying charges another with having tes-
tified falsely - an action lies. Esp. 505. 18. 1 Saunders. 131. 4 Bac. 518
1 Com. 194. Barr. 807.

"That the words were spoken by A^{ts} as
counsel in a cause" is in some cases a good defence, a justification
in others not. 4 Bac. 518. 498. 4 Bul. 10. But when the
words (the false &c.) are pertinent to the cause (suggested
by his client) he is not liable. Esp. 517. 1 Com. 194. Cro. 290.
But if the words are impertinent (the suggested by client) or if
being pertinent they were not suggested i.e. action lies 3. Bl. 29.

Most of the books however make a difference between the
being suggested. Bul. 10. Esp. 517. 1 Roll. 87. L. 25. 1 Com. 194. 1 Roll. 33.

It has been decided that for the purpose of mitigating damages

in favour of a client an advocate may use scandalous words, not pertinent. 21 Bac. 498. Hob. 328. 1 Roll. 87. l. 10. 33. l. 20. 2a. In a subsequent case (Htg. 62.) holden an advocate is never for scandalous words in defending his clients cause, - his duty - presumed he was influenced by his client &c. 2a. - later writers do not mention the two last cases. -

When there are two counts one charging actionable words, the other words not actionable then a plea to the whole entitles damages are given - judgment will be arrested and a verdict de novo awarded. 8 T. Rep. 564. Secus if the words are all in one count. 10 Co. 130. 3 Wils. 177. Cro. E. 320. 788. Stra. 1094. 1 T. Rep. 508. 92. i.e. laid to have been spoken at one time. Bul. 8. 2 Bac. 7. Root 346. 2433. 10 Co. 131.

Vid. 4 Co. 17. 1 Roll. 39. 51. 65. 71. 1 Lw. 156. Cro. Jac. 622. Stra. 142. Cro. Eliz. 268. J. Burr. 8. "scilicet I do not see the reason of this distinction tho it appears to be well established. Words which are not actionable are introduced for the purpose of showing the circumstances with which the others were spoken. It is said the court will refuse arrest of judgment when the actionable words & those not actionable are laid in different counts, because the court cannot discover upon which of the charges damages are ascribed by the jury. Now how can they discover this more easily when the words are all laid in the same count."

In actions for words not in themselves actionable special damages must be stated. This is the gist. Esp. 520. 8 T. Rep. 136. Bul. 6. 7.

So when the words are actionable the Plaintiff may state & prove special damages, but in this case

he can prove no other special damages than what is stated specially 7 Bul. 7. Tho he may prove genl. damages as loss of customers in genl. such genl. damages being laid. 2w. Bul. 7. Kirk. 65. 290. 8 T. Rep. 130. Esp. 520. 1 Roll 58.

What amounts to an allegation of special damages? Sta. 666. Kirk. 290. Bul. 7. 8 T. Rep. 133. 1 Roll. 58. Sid. 396. 1 Vent. 460. 9th 499.

But when the words are not in themselves actionable holden that the special damages may be proved under an averment of genl. damages. Sta. 666. 1 Com. 198. 2w. Bul. 7. Kirk. 290. Esp. 520.

Immateral what the false words are if they are malicious & occasion special damages. Ex. calling a single woman incontinent - with bring a slut &c. by wh. she loses a match. 4 Bac. 496. 4 Co. 17.

In case of slandering a title (as it is called) as calling an heir apparent a bastard - it is suff. to show unnot a probable damage - No action lies if Def. claimed the title (4 Co. 17) as heir. Esp. 501. 6w. Jac. 213. 4 Bac. 494. 1 Roll. 38. Ex. Plffs for this had signified a design to disinherit - suff. also, that the words tend to disinherit. 4 Co. 17. a. Esp. 501. So decided in favour of youngest son.

Our recovery of damages is a bar to another action for the same words, whether the words are actionable per se or not. Esp. 519. Bul. 7. Claim necessary to prove the words precisely as laid now suff. to prove the substance. 7 Bul. 5. 2 Roll. 718. Esp. 521. But the same language must be the same. 4 T. Rep. 217. 8 id. 150

In actions of slander in genl. Plff after proving the words stated may give evidence of other words of a similar kind spoken at another time & even after the action bro't - & to be in aggravation of damages Esp. 518. Bul. 10. Cas. citd. But this cannot be the principle - for

1 Words not actionable may thus be proved. 2 Words actionable (which may be thus proved) are a foundation for a distinct action. 3 Words spoken after action bro't may be thus proved - the true object is to show malice. Bul. 7. Esp. 520. Str. 691.

But when words spoken at another time are given in evidence under this rule - Def^t may prove them true to rebut the inference Esp. 518. Bul. 10

When words not stated & spoken at different times are proved they must be similar to those charged. Esp. 520. Plt's "same words only". Bul. 10. Words similar Esp. 515.

Dec. 6th has decided against proving like words spoken at diff^t times to show malice. Vert. 181. Decided many times for & con.

Eng. Stat Limit^y as to slander. 2 y^{rs} from the time of uttering. It extends only to actionable words. Esp. 519. 1 Sid. 95. In Lambth 34th

Plm necessary to prove the words precisely as laid. Plff^t may prove the substance. The manner must be the same. The persons of, promising must not be changed. 2 Roll. 918. Bul. 5. Esp. 521. 4 T. Rep. 217.

as against acts of slander by a g^t time will not lie 2 Burr. 384. Esp. 504. Bul. 5. Bon. 195. Dy. 19. a. 2 Bac. 511. Yelv. 120. 1. Action test act. suppon an act.

II. Slander by writing: A Libel.

As to the nature of slander by writing. 1. Whatever words would be actionable if spoken are equally so if written. Esp. 504. 3 Bl. 126. But written slander is a more aggravated injury - as having a more extensive circulation & being always deliberately committed. 3 Bac. 490. 3 Bl. 126.

The rule does not always hold & conversely (post) yet Esp. 504. says it differs from slander by words in this only, that it is delivered in writing or printing claim 3 Bl. 126. Perhaps his meaning is - that words which if spoken would not be slander are not slander when written, tho they may be actionable as being libellous.

Definⁿ of Libel. Any malicious defamation of a person (living or dead) made public by writing &c tending to excite resentment or to expose the object of it to odium contempt, a ridicule &c. 4 T. Rep. 128. 1 Hawk. 172. 352. 4 Bl. 150. 3 Bac. 490. It seems to have been chiefly promulgated with reference to libels consid^d as a public offence &c. dead person, exciting resentment.

The libels in genl^l there are two kinds. By indictment &c. 3 Bl. 125. 3 Bac. 492, 8.

Of the rules applic^{ble} to oral slander apply to cases of libels as civil injuries.

2 - so the negative rule, as to oral slander apply. Ex. To change with crime, &c. Esp. 504. 3 Wils. 403. Tha. 898. 3 B.R. 126.

But nothing is construed a libel wh. is made in the regular course of legal proceedings Ex. In a debt complaint affidavit &c. Esp. 505. 2 Wms. 807.

Action lies not for publishing a true account of a trial in a court of justice. - the diff. character is injured by it. 1 B.R. 525.

In a civil action the truth of a libel or of words not written is a Justification. 1 T. Rep. 748. 4 Wils. 150. Hob. 253. 2 Mod. 166. 11 id. 99. 3 B.R. 125.6. But 89 over Holden contra 2 B.R. 516. 5 id. 495.

It is an element of proof (3 B.R. 125.6. 4 id. 150. Tha. 498. 5 B.R. 125) the falsity aggravates the guilt (2 McMy 648). It is the bad reputation of the person libelled any justification. 2. McMy. 649.

It is essential to the constitution of a libel, that it be published. But writing it originally seems to be sufficient dictated by a third person. Esp. 510. East 405. 5 Mod. 163. 2 McMy 622.

But merely transcribing it without showing it to any one is not a publication. Esp. 510. 9 B.R. 59.6. But it is evidence of a publication if the libel be made public. See - as to the 1st rule Gal. 419.

But composing it - procuring it to be composed - reading it after he knew the contents - delivering to others after he knows &c. amounts to a publication in Law. For to be wilfully or wrongfully instrumental in making it public is to incur the guilt of actual publication. Esp. 510.

9 Co. 59. 5 Co. 125. 3 Bac. 497. 1 Hawk. 195.

The sale of a libel by a bookseller or other is prima facie evidence of a wilful publication, on the seller. 2 McCr. 644. So of printing, i.e. prima facie evidence. 2 McCr. 643. 2 Bl. R. 1848.

So sending it to the press for publication is a publication in law & the person sending is guilty of publication when it is printed Foster 201. Esp. 510.

Leaving it in the printer's hands is a publication Esp. 510. 5 Co. 125. 5 Burr. 2660.

But imputing fault of a libel in manuscript without malice has been held to be no publication Esp. 510. Mo. 627. 813. 1 Hawk. 195. 2 McCr. 643.

Writing it to the person who is the object of it suffices for a publication for a public prosecution 4 Bl. 150. Hawk. 195. 3 Bac. 497. Esp. 506. 10. Pop. 139. Note for a civil action Hob. 62. 215. 12 Co. 35. 1 Mod. 58.

If the letter were a friendly exhortation it is sufficient for a public prosecution - (publication meaning) Esp. 506. See clearly not actionable if an ally libel which is imputed a public prosecution actionable 4 Bl. 125. 3 Bac. 492.

Words written are often actionable when if but spoken they would not be, 2 H. Bl. 532. arg. 1 Bl. R. 331. 1 Saund. 120. 2 Show. 313. 1 Mod. 58. 1 T. Rep. 782. arg. 597. 3 Bac. 492.

Writing & publishing anything falsely which makes a man odious or scandalous is actionable. 3 Bac. 492. 2 Wils. 253. 1 Bl. R. 331. So by postal & other means suffices 3 Wils. 252.

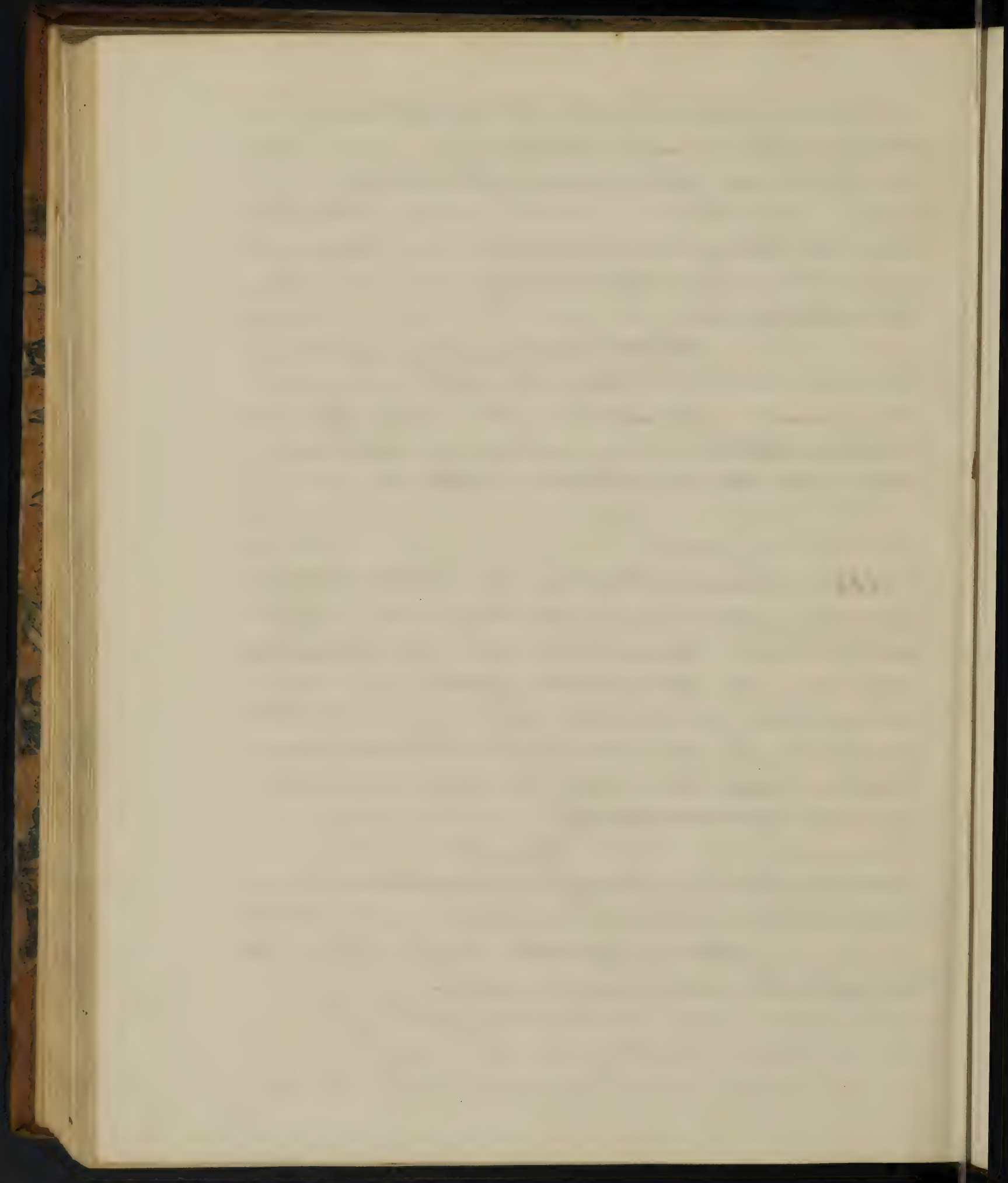
So disturbing domestic peace &c. & by Esp. 505.
Writing or printing of even that "he is a swindler" is actionable 1 T. Rep. 728. Even if spoken, 2 Hen Bl. 531.

The offence
Singing of a libel are considered as repeated in every stage of its
circulation - Therefore Verme not changed in Reg^d 1 Wils.
178. 1 T. Rep. 571. 647.

Tho the printing expresses only the initials or even or two letters of the name of the person against whom
it is intended, - or figured names it is a libel, - the manner
being such that it must indubitably refer to the person.
3 Bac. 493. 1 Hawk 194. Esp. 506. 2 Attk. 470.

III. Slander without words, or libels without writing.
Esc. raising a gallows before ones door & hanging him in effigy.
Esp. 511. 5 Co. 125. Representing an ignorant man by painting to
3 Bac. 491. How the application of the slander must be
always made by innuendo & insinuations. Also
special damage must be always shown. This kind not ac-
tionable in itself. Esp. 511. 3 Bl. 125. 6. Otherwise not under-
stood to be libelled at the P^lff.

By our stat. 6 Geo^{III} slave who
is not punishable as a public officer. 78. G. 205. H. 600. 141
Fine not exceeding \$34 to the Co. treasury - never inflicted
for defaming etc. magistrates &c. - fine imprisonment
disfranchisement or banishment. -



Action on the case for Malicious Prosecution.

This action is brought to recover damages against one who has procured an indictment or other process or brought an action against the Plaintiff from an corrupt motive, i.e. malice without any ground or probable cause. *Fitz. v. B.* 116. *Esp.* 525. 7, 8. 1 *Bac.* 61.

Analogous to the old action of conspiracy which is now much out of use - Conspiracy lies only against two or more for having falsely maliciously procured for treason or felony others endangering his life. 1 *Samuel*, 230. *Finch* L. 305. 3 *Bl.* 126. 2 *Bul.* 271. *Esp.* 530. 1 *Com.* 158. *Ray.* 179.

Another analogous action is the action on the case in nature of a conspiracy - action on the case in nature of lies when two or more conspire to prosecute another maliciously without cause - or otherwise conspire to injure him in person or property. *Finch* L. 305. *Salk.* 14. *Esp.* 530 1 *Bac.* 61. 1 *Samuel*, 230. a.

The gravamen for action of malicious prosecution resembles in some measure that of slander. It is not necessarily or generally the danger to which the Plaintiff has been exposed, but the vexation, expense & scandal. 3 *Bl.* 127. 10 *Mod.* 219. 20 *Str.* 691. *Salk.* 134.

Action for conspiracy lies not in case the Plaintiff has been actually prosecuted (*Esp.* 527. 8). & acquitted (12 *Co.* 23 *Co.* *Sac.* 8. 1 *Roll.* 112.) for so are the words of the writ. *Fitz. N. B.* 1. 15. b. 4. 260. 1 *Wils.* 211. *Esp.* 530. 1 *Com.* 161.) Indictment for conspiracy lies when there has been an unlawful conspiracy as above the nothing is recent. 2 *Lew.* 51. *q. Co.* 56^t *Esp.* 530. So action on the case in nature of a conspiracy.

lies tho no indictment &c. has been actually exhibited, 1 Bos. 61
1 Roll. 112. 1 Com. 158. 225. i.e. Imposition for charging a crime
by conspiracy - Injury to reputation.

Difference between conspiracy action of, & action on the case in nature of &c. - In the
former if all but one are acquitted, Indictment cannot go
agst him - In the latter it may go agst one only. Esp. 530
Ray. 379. 5 Rep. 176. 1 Com. 159. Bul. 14. 1 Wils. 210. 2 Lw. 52.
1 Roll. 111. 2 pl. 5. 5 Mod. 408. 6 ib. 169. Cro. Jac. 239. The first is
a formed writ in the register - The latter a special action on
the case - In the former, the damage to wh. the conspiracy
exposed the Plff is the gist - In the latter it is the consequent
damage, scandal &c. Barth. 416. 3 Wils. 126. 7. Bul. 14. 10 Mod.
219. Sta. 691. 1 Linn. d. 230^a Is in case for Malicious prosⁿ

The latter i.e. on the case in nature &c. is substantially an action
for Mal. prosⁿ with this difference - that the latter may
be brot agst one, no other being concerned. The former
must be brot agst two or more or agst one charging that
he with another or with others had conspired &c. 1 Com.
159. The grounds of the two actions are therefore the
same. Esp. 531. 2 Lw. 52. Cro. Jac. 173. 239. 1 Wils. 210. 1 Linn.
230^a Ray. 176. 5 Mod. 408. Bul. 14. & the two are said, justly
may be agt one only -

It is essential to the support of this action (for mal. prosⁿ)
that malice want of probable cause in the former prosⁿ sh^d have concerned.
Malice what? falsity alone not suff^t Bul. 14. Esp. 529. Burr. 1971. 15 R. 5445
It lies therefore agt an who maliciously promotes a false prosecution agt
another knowing the charges to be false, & having no reasonable ground to
believe them true. But it is always suff^t for Def^t to show probable cause

whether brought with malice or not. Wal. 14. Esp. 533. Co. 6. 900

In both when the act is for a false & malicious civil suit it is called a vexatious lawsuit.

This division pursued.

1st Of Crim. prosec^{ns}. false & malicious.

If a man is falsely indicted for a crime that would injure his reputation he may have this act. 1 Sid. 15. Yelv. 146. Sal. 14. So if the charge exposes to danger his life or liberty. Sal. 15. So an indict. false & subjecting to expense only is suff^t to support the action. Ray. 378. Salk. 15. arg^t Hy. 377. Esp. 528. Sta. 977. Ex. Hubb^d. runs alone for expense incurred in a malicious prosecⁿ of his wife - actⁿ lies.

Ex. showing that danger to the life or liberty of D^{ff} is not necessary - The indictment having been ill, so that D^{ff} was in no danger of a conviction is no answer to the action. if the charge injures his reputation &c. Esp. 528. 47 Rep. 248. 3 Bl. 127. Sal. 15. 1 Bac. 61. Scandal vexation expense suff^t.

So if the indictment in the last case was not found by the grand jury yet the action lies for the vexation expense & scandal. Esp. 528. Co. 2. 900 Sal. 14.

So expense alone caused by insuff^t indictⁿ suff^t to support the actⁿ - Ex. Indictmⁿ for exercising a trade without license - tho the reputation of the party is not injured nor his prop^{ty} security undamaged. Sal. 15 in marg. 37 M. 127. 10 mod. 148. 214. 61. 25. 73. 137. 1 Bac. 61. Esp. 528. 2 Sta. 977. Salk. 14. 5. contr.

Public officers conveying prosecⁿ on false information not liable, But the person giving the false information knowing it to be false

a without probable cause is so. 1 Leon. 187. Cro. E. 130. 2 T.R. 231.
2 Bac. 61.

But if a public off^r without information of his
own mere motion maliciously &c. promotes another.
(Leach. 161.) He is liable (1 Bac. 61. 2 T. Rep. 231. 225 Cro. E. 130
1 Com. 158. And the off^r acts ministerially. Omb. in pa.

But if the public off^r in the last case is the magistrate
granting the warrant & the grievance is that Plff was
arrested under it. This is not case in the proper remedy
and in this respect the case in Cro. E. 130 is denied. 2 T. R.
Rep. 231. Esp. 530. Doug. 650. "False imprisonment".

It must
always appear from the dictⁿ that the prosecⁿ for wh. he
is in some way at an end. In conspiracy "legitimo mo.
do acquittatus" is necessary. ante. 9 Co. 56. 4 Doug. 205. 10 Mod.
209. 2 T. Rep. 231. Hob. 267. 1 Stra. 114. "Plff was discharged
from prison" not suff^t. But the suspicion
to show the prosecⁿ is at an end is cured by verdict.
1 Larrind. 228. Esp. 532.

An allegation that "Plff was acquitted
on the right prosecⁿ" not supported by evidence of a non pros.
for this is not an acquittal. Bul. 14. Esp. 536. Sal. 21. 6 Mod.
261. The dictⁿ states all the proceedings in the right prosecⁿ
execution & any misstatement in a material part of the indictment
is fatal. Esp. 532. 3 T. Rep. 490. Ev. a variance between the
right & end & dictⁿ as to the day of acquittal. 6 Mod. 216.
demon if it is in an immaterial point Esp. 532. 2 Bl. R. 1050

It seems that no writ or civil act lies aft^r judgment of record

Errors - grand jury &c for even malicious acts done in the exercise of their judicial powers. 1 Com. 158. Esp. 635. 12 R. 503. 13. 4. 34. 5. 7. 8. Cowp. 161. 72. 1 Hawk 191. 2 Burr 322. 2 Bl. R. 1141. 126. 23. 4. 2 Mod. 219. See E. 130.

Malice may be & generally is inferred from want of probable cause. Burr 1974. but want of probable cause cannot be inferred from the most express malice. 1 T. Rep. 524. Esp. 529.

To prove malice Dff may give in evidence collateral circumstances as an advertisement by Dff^t that the indict^t was found - malicious &c. Esp. 535. Sher. 691.

Convict^t of Dff in the right process by a competent jury, dictum is conclusive evidence of probable cause. Esp. 529. 1 Wils. 232. Not. 267. 6 Mod 262.

Acquittal is in most cases presumptive, but more than presumptive evidence of the want of probable cause. i.e. in most cases, at sup. 4 T. R. 247. Sol. 15 pl. 5. But q^u. Whether "ignoramus" found is prima facie evidence of want of probable cause?

Acquittal not always prima facie evidence of want of probable cause &c. If the Dff was bound over by a court of inquiry, or the bill of indictment has been found by a grand jury - Oris lies on Dff the acquitted at trial the presumption being in favour of complaint. i.e. Dff^t Esp. 536. Bull. 14. Sol. 15. So if it appears from the report of the Judge, there was probable cause. Bul. 14. Esp. 529. 30.

But when the facts lie in the knowledge of Dff^t himself

he must show probable cause, though the grand jury have found the indictment. 2 Bul. 14. Esp. 535. 6. 4. 16 mod. 216 + 1 Ex. prosec. for robbing. Deft.

And proof of the evidence given before the grand jury is good evidence of probable cause. Bul. 14. 6 mod. 216. Deft. oath at the orig^l trial as to the witness of the crime charged is admitted. - if no other person was present at the time. - Prosec. for robbing. Deft. -

The witness of probable cause is a mixed question, partly of fact, partly of law. What amounts to probable cause, is a question of law merely, whether the circumstances alleged to prove probable cause are true is a question of fact. But the fact being given, the inference is a conclusion of law. 1 T. Rep. 545. 19. Bul. 14. Esp. 529.

Therefore regularly Deft. plea sh^d. show the grounds of suspicion on which he acted. Cow. El. 134. Esp. 533.

So it seems necessary for Deft. to show that the crime for which he prosecuted was committed - necesse, then can be no probable cause. Deft. Esp. 534. 6. mod. 216. 2 Hawk. 120. Ex. Deft. believes his prop^y to be stolen when it is not.

So what amounts to malice, or the witness of malice, the facts being given is a question of law. 2 Ld Ray. 1493. 1 T. Rep. 519. 1 Wils. 233.

When the action is for a malicious prosecⁿ for felony, a copy of the record granted by the court in which the trial was, is necessary & the granting is discretionary. Esp. 535. 1 Bl. R. 385. 1 Bac. 61. When the crime charged

is of a misdemeanor only, such copy not necessary. Esp. 534.
1 B. & R. 385. Orig. produced by 6th. sufft.

Secondly, when the action lies for a groundless civil suit & an
action, lawsuit. Genl. rule as laid down is that the
action does not lie for bringing a civil suit even though
there is no right of action because it is a claim of right.
Plff is answerable for false claim & is liable for costs.
Bull. 11. Sal. 13. 4. Esp. 525. 1 B. & R. 205. so no damages
presumed near for civil process.

Exception 1. When there
is good cause of action for one and another having no action
sues & arrests the debtor, the action lies. Esp. 526. Bul. 12.
Sal. 14.

Exception 2. When Plff in orig. suit having good
cause of action sues in a court not having cognizance
the action lies. 4 Co. 14. But it is an exception that the Plff
(the orig. Plff) should have known that the court had
not cognizance. Esp. 526. Bul. 12. 2 Wils. 302.

3^d If a person
having no right of action nor colour of right & knowing
it to be so, sues another for the purpose of vexation, he
is never liable 2 Wils. 305. No such case in the old books.
1 B. & R. 388.

4th So if for such purpose he sues him for a
much greater sum than is due. 1 Saunders. 228. Esp. 525. 6.
1 Side. 424. But it is said that the action will not
lie in the last case for arresting unless Plff has been
held to receive bail. Esp. 526. Bul. 12.

When the suit

is entirely groundless & known to be so by the orig^l Plff the
bro^r in the proper court has arrest of the person, but
rarely prop^d taken, action lies. Esp. 527. The first suit
being malicious. Ex. Df^t. has said out a second
fi. fa. & sold plffs goods under it after having taken
other goods under fi. fa. Actⁿ lies for vexation & dam-
ages. Not. 205. 66. Bul. 12.

The particular grievance
must be stated, when founded on former civil suit,
& that it was done maliciously & with intent to injure
& oppress the Plff. 2 Wils. 205. Esp. 532. 1 Gal. 14. 1 Sid.
424. Ray. 380. Go on purpose to hold Plff to bail,
if that is the injury. 1 Gal. 15. Bul. 12. no damages
being presumed.

Qu^o whether necessity arising or
debts from home without any particular benefit to br.
but from apparent malice is a foundation for the actⁿ?
decided not to be. Sup^r. et. Cor.

In the above receipted cases
it is necessary that special damages be alleged & proved.
1 Gal. 14. 5. Ray. 374. Licens if a stranger incites A to bring
groundless suit ag^t B. - no spec^l damage necessary as ag^t
him (as in crim^l cases) not a claim of right by him. He is not
amenable. 1 Gal. 14. Ray. 380. nor liable to costs.

Two requisites in all cases to support this action for a
civil suit. 1st Damage actⁿ determined, i. e. ended, for
it cannot otherwise appear to be groundless or unjust.
Long. 205. 1 Gal. 15.

2^d Damage, i. e. actual, already incurred

or inevitable. Esp. 527. 31. Stra. 114. Bul. 13. Therefore if one
forge a bond in my name, I can have no action till read
upon it.

But it is not necessary that the vexatious writs sh^d.
have been decided in favour of the present Off. Ex. Mon.
writs suffered on the orig. action. yet this lies. Esp. 527. Bul.
13. Any groundship proceedings by action when ended,
is on this point sufft. Esp. 527.

Our stat. gives an action
ag^t all who wittingly & willingly, wrong others by presenting
any writ with intent to vex & trouble &c. Triple dam-
ages - also subjects to fine & 7. s. for third offender to be pro-
ceeded ag^t as common Barrators. St. Leon 429.

Two cannot
join in an action for a vexatious writ - injuries being separate
& personal. Hilt. 145. But there may be two Def^s. sent.
Bul. 5. 1 Stra. 79. 2 ib. 910. Esp. 537.

Whether damages may be
recovered in this action ag^t writ. 2u. Tropani con. How can
they be awarded Esp. 537. 1 Stra. 79. 2 ib. 910. The matter
of Def^t. enters into the considⁿ of damages. Esp. 537. 4 Burr
1971. not surrable by the Leon. practice. R. L. 433.

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Assault & Battery

Assault is an attempt or offer to do a corporal hurt to another by force without touching. Ex. lifting a weapon or fist in a threatening manner. Com. "Bald." C. D. 1 Bac. 154. 3 Bl. 120. Esp. 312. Bul. 18. To presenting a gun, drawing a sword, pointing a pitchfork &c. to one within reach of it. 2 Roll. 545. 1 Vent 256. 1 Hawk. 133. Any unlawful sitting upon the person & offer to beat Finch. 2012. This is an inchoate violence & assault to an injury 3 Bl. 120. 3 Russ. N. E. L. 85. tho no actual damage

But a gesture otherwise amounting to an assault may be explained by words spoken at the time, so as to fall short of an assault 1 Bac. 154. Ex. A lays his hand upon his sword & says "if it were not against the law" for the intention must operate with the act to constitute an assault 1 Mod. 3. Esp. 312. 10 Mod. 187. 2 Keb. 545. Words alone then cannot amount to an assault against opinions contra. 1 Bac. 154. 1 Hawk. 133. 134. 2 Roll. 545. 1 Com. 590. But threats of bodily hurt producing actual inconvenience are an injury Ex. Interruption of ones business. 3 Bl. 120. Remedy is Trov. ass. - post -

Battery consists in the actual commission of violence upon the person of another. Esp. 312. The least degree of it, if done in an angry, spiteful and insolent manner is battery. 1 Bac. 154. 6 Mod. 179. 42. 1 Com. 589. 1 Hawk. 134. Ex. spitting in the face, trading an overtor. The unlawful beating of another. 3 Bl. 120. But is a battle of course unlawful? for it may be justified. Salk. 607.

Every battery includes an assault - proving of battery will
therefore support a charge of assault & battery. 1 Bac. 154. Sel. 302

Assaults of bodily hurt, the not amounting to an assault (for
words alone cannot constitute an assault) are in some cases
actionable injuries. When they occasion an inconvenience
they are actionable. See note. 3 Bl. 120. Finch 202
Barn. "Bates" C. D. 1 term. 590. 2 Bl. 545. The action
is trespass vi et armis 3. Bl. 120. et seq.

In battery the injury
must be immediate, but not necessary that it should be instan-
taneous - Effect of the act of setting down suff^r - if produced by
a continuous train of effects - In qu^o any wanton act
by which one causes an injury supports the action, Du. Vent.
295. E.g. Sp^r threw a stone into the market place which
eventually put out Diffs eye. 3 Wils. 403. 2 Bl. R. 892. Str.
634.

The particular distinction below
between assault and battery.

So if one pushes another who falls on car-
lessly at the latter falls against a third, a ctⁿ in ass^t the first.
Esp. 313. But. 16.

If a horse taking sudden fright runs against
a person the rider cannot be liable - not his act. - But if
a third person struck the horse he would be liable for all con-
sequent mischief. Esp. 313. 4 Mod. 205. id. 24. 1 term. 589.
Sel 637. But. 16. That he is liable in an ass^t in the case
see Sel 637. arg^t "Tres. on the car."

When a person receives bod-
ily hurt from an act to which he consented he may sue
him in an ass^t - in other words, it is said. Esp. 313.

Rule. If the act consented to was legal, he has no remedy. Ex. Hunt by playing out endgame - no action. It promotes courage. 1 B. & C. 154. If Hunt by boxing consented to by him, he has an action - unlawful. B. & C. 16. 2 L. 174. & consent could not make it lawful - & volenti non fit injuria does not apply - In an note both participants criminally?

So consenting to be beaten does not justify the beating. Esp. 313. Camb. 218. B. & C. 17. In the civil action? But that the injury happened in an amicable contest as wrestling is a good reason - consent good. Lavers Pl. 125.

If one in defending himself accidentally injures another behind him, he is liable to this action. 2 M. Rep. 896. T. Ray. 468.

Malicious intent is clearly not necessary, to subject to the action vi et armis. For a lunatic is liable to it. Lat. 13. 110. Doug. 640. Esp. 399. Holt. 134. civiliter non criminally. 1 Fort. 81. It is a good rule that in cases arising ex delicto, innocence of intention excuses. Doug. 629. not universal. 1 Cam. 284. Cro. E. 19.

But how far an accident will excuse an involuntary trespass has been a question of much difficulty, according to 1 Fort. 81. it is sufficient to make one liable that "he has been the physical cause of damage." This is too broad a rule, for it would not admit even inevitable accident as an excuse - If the injury happens by fault of the party injured, excused. Holt. 134.

It is said that "inevitable accident" is inevitable in fact only

shall occur. Hob. 134. 1 Conyn. 589. All. 55. 2 Roll. 528. 3 Wils.
377. 2 Bl. R. 896. 3 Wils. 410. Stra. 596. 1 Fent. 81.

Meaning of
"inevitable" what? That the accident should be physically
unavoidable? if so the case in Bul. 16. seems not to be
law, where a distinction is taken between wantonly rush-
ing a drunken man ag^t another & attempting to assist
him - for in the latter case the accident is not physically
unavoidable & in Hob. 134. the 6th the thing is the word
"inevitable" agreed on the ground of neglect 1 Bac. 154. 5
Esp. 319. 38. excused if utterly without his fault. Hob. 134.

Bul. 16 supposes that if a horse used to run away with his rider
takes fright & in running injures another, the rider would
be liable on the ground of neglect. Yet the immediate
injury would seem as physically inevitable, as if the
horse had been used to running away &c. But here the
rider would be exc. for neglect - not the rider exc.
1 Vent. 295. Allot of the ex. given suppose some neglect,
as the case of cutting a hedge of thorn, which fell on
B's land - there was neglect. 5 Ray 467. So in the case
of topping boughs cocking gun. Stra 596 Burr. 2092.
Esp. 383. So when B's timber floats on C's land
2 H. Bl. 257. 8.

Rule is clearly, that when the injury is
inevitable the def^t is excused. Hob. 134. 2 Bl. R. 896. 3 Wils.
37. Ex. can taken with the apoplexy fall ag^t another.

The injury cannot be said to be inevitable when the
act causing it is voluntary, i. e. when the act is not

the effect of a cause alone against conduct. But still there is not any liability if the party injured is himself the faulty cause. -

In the other case according to some opinions if the act causing the damage is lawful & the agent guilty of no neglect, no want of care, he is excused. *Es. 599. But. 15.6. Es. 313.7. helping a drunken man. But 16.7.5 But 168. sed. qu. better opinion seems to be, injury must be inevitable*

In *4 Bar. 2092. Man killed by Dept. dog. - the Dept. would not be considered as the agent, nor the act his, unless the injury was voluntary on his part - When the injury is wilful the author of it is undoubtedly liable.*

But when the act causing the damage is unlawful, the author is in some way, either in trespass or nuisance liable at all events, whether there is the least neglect or not, for the consequences are direct & immediate. *2 Bl. R. 893. 2 Ld Ray. 480. 1572. 12 Mod. 609. 39. Vint. 295.*

The above rules as to accidents apply to trespass in general.

Three kinds of defence. Denial or infirmation, Excuse, Justification. *But. 17.*

Aff. &c. are justified in many cases. 1 Barn. 539. 3 Bl. 120. Es. an off. having legal process to arrest may use violence in case of opposition so far as is necessary to effect the arrest. Es. 314. 2 Bar. 158. 1 Hawk. pl. 13.

But a battle is not justifiable in this case unless there is actual resistance. *Ray. 229. or an attempt to escape. 2 Stra 1029. But. 18.9. Es. 314. 3 Lev. 463. Cro. E. 93.*

can am't simply will justify an assault only.

But a mollition
in our opinion is making the assault is justified the no in
sistance. Sta. 1049. v. Roll. 546. 1 B. & C. 156. Bul. 19. 5 Com. 535.

Plea of mollition means to go to the justification of the Battl
as well as assault. 5 Com. 355. Skin. 387. 6 W. & A. 2. 2 Ventr.
193. 3 Lev. 404. Esp. 314. but note of bruising wounding &c.
8 T. Rep. 299.

Battl. is justifiable on the ground of self
defence. 3 Bl. 120. As if an striker run first. I may
strike him. So an aslt. by Df. is suff. to justify a
battl. by Df. As if Df. lifts a weapon &c. 1 Com.
589. Bul. 17. 8. Esp. 315. Plea. son aslt. &c.

But then
must be some proportion between the assault & Battl.
by Df. & that by Df. For every aslt. &c. however small. will not
justify every Battl. &c. however great. 11 Mod. 43. Bul. 18. & the pro-
portion is a question of evidence - a small blow will not jus-
tify a man, Df. strikes Df. a scuffle arises & Df. is
in danger &c. & is justified. 1 Bl. 642. Sid. 246. Esp. 315.
Df. strikes a small blow & Df. in return may be

The plea in this case is "son aslt. denui" i.e. that first aslt. has
come from Df. & that Df. struck in self defence. Esp. 315.
1 Bl. 642.

But mayhem it seems is not justified by Df. &
is a felony unless the Df. at night in danger Df. life
1 Ray. 177. Esp. 315. 1 Bl. 642. 1 Mod. 43. or murder. 1 Com. 590

As to the aslt. de regimine &c. 1 B. & C. 60. 76. 86.

If the Peff was the blameable cause of the batt^l. (who in said not strike nor threaten to strike) Def^t. is justified in some cases as when Peff tilted the seat on which Def^t. was sitting. Def^t. bit off Peffs. finger. 1 Ray 177. Sal. 642. But the man who in this case seems to have been justified by Peffs. attempting to gouge Def^t. 11 Mod. 43. Ray 177. So when Peff. thrust his money into Def^t.s. haap & a scuffle ensued Def^t. was justified: Esp. 315. Cro Jac. 366.

Parents justified in giving children reasonable correction. Master his servant. Schoolmaster his scholar Teacher his prisoner Esp. 315. 1 Sid. 176.7. 1 Hawk. 130. So according to some here b^y his wife. 1 Hawk. 130. F.N.B. 80. 1 Bac. 155.

These relations constitute special justification

A man may justify a batt^l. in defence of his wife, so of parent & child. Esp. 314. Bul. 18. 2^d Ray. 112

Clearly a servant may justify in defence of his master - but converso. 2^d - 3 Bac. 568. Esp. 314. Bul. 18. 2^d Ray. 62. 2 Rose. 546. 1 Hale 484. Sal. 407. 1 Pl. 429. 5 Com. 554 Stra. 953. That the batt^l. must have been in defence & wife &c to prevent her being injured - not vindictive. Esp. 314. 2^d Ray. 112, n.

So one may justify Batt^l. in defence of his property forcibly invaded, as by breaking a door, gate &c. But if there is nothing more than a mere entry on one enclosure (which implies force in some only) the owner is not justified in a batt^l. without a request to depart Esp. 314. Bul. 19. Sal. 641. 1 Hawk. 134.

In case of entry on lands however, the batt^l. must in pleading be justified not as a batt^l. but as a molestation & Bul. 18.9. Esp. 314.5. 2^d Ray. 62. Sal. 407. 5 Com. 355. 11 Mod. 36

8. th Rep. 8. com.

The last rule contemplated the owner of prop^y in possⁿ & relate to his right of expunging his prop^y: but when he is dispossessed or dispossessed a diff^t rule now obtaining the arts real prop^y not known at C.L.

At C.L. one who had a right of entry or possⁿ in lands was allowed to regain possⁿ by force from the disseisor &c. 2 Bac. 555. 3 Bl. 179. 4 ib. 148.

But now by new Eng. stat^s. (first is 5th Richd. 3^d) one may not enter in lands of which another is in possⁿ (as by holding over after a term is expired - or taking a vacant possⁿ) except in a peaceable manner. 2 Bac. 555. 4 Bl. 148. 3 ib. 179.

These stat^s. contemplate only possⁿ which are in some degree & in some way abandoned by the owner. As in case of lease, where possⁿ is given to lessee - & case of lands &c. the possⁿ which is neglected by owner & vacants, namely taking a journey, is not such an abandonment as to render force - owner's right to use &c. "Forcible entry."

In case of freehold property, owner not allowed at C.L. to regain possⁿ by force 3 Bl. 45. 3 Inst. 134. 2 Roll. R. 55. 6. 565. 6. unless feloniously taken.

Prosecution never justifies a batt^l but may mitigate damages. 1 Will. 6. Esp. 317. A servant cannot justify a batt^l in defence of his master's goods. 5 Com 354. Cor. C. 242.

Aff^t & batt^l at diff^t times cannot be laid with a continuando, as "diversis diebus & vicibus" &c. Esp. 361. For an aff^t is an entire indivisible act Corp. 828. 3 Bl. 212. See 6 Bl. 9.

For batt^t of wife, husb^d & wife sh^d join. & the injury sh^d be laid
"ad damnum ipsorum", for husb^d is damaged by cost & ex-
pense of seeing & the wife is personally injured & damages
would survive to her. Esp. 316. 1 Sid. 387. 1 Roll. 782. L. Ray 1208.

If damages are laid ad dam. of the husb^d only
Jury^t assents. Esp. 316. L. Ray. 1208. If Defts assents
husb^d & wife it must be pleaded in abatement. Esp. 321. Stra. 480

If batt^t has been committed ag^t husb^d & wife he alone must
sue for the injury to himself. Esp. 316. L. Ray. 1208. 1 Roll. 782.
H. 2. Co. L. 3655. If both join in this case for the damages to both
& not damages are given. writ abates quod the husb^d after
verdict. (Esp. 316.) If joint damages Jury^t assents in toto.

If many lay in aggⁿ of damages it is said) many facts
for which he could not himself recover E.g. assaulting Just^s
Esp. 317. Sal. 642. Qu. Is it to aggravate damages or show how
monstrous the trespass was? Ib.

In Eng a justification must
be pleaded in case of a Batt^t. - as son ag^t dismember. So in
other cases of Trespas. Esp. 317. Co. Lit. 282. i.e. where Def^t
on the facts shown is prima facie a trespasser.

That cir-
cumstances which attended the transaction (as words spoken
at the time tending to create a mutiny in Def^t's ship)
may be proved in mitigation of damages. - tho if
pleaded they would have been a justifiⁿ Esp. 317.

If Def^t jus-
tifies an abs^lte, he must confess the batt^t. as the plea is ill
Esp. 318. Sal. 637. E.g. Plea. that Def^t horse run away with

him ag^t his will &c. for there is no batt^t by Def^t.

The gen^l respⁿ

to a plea of son. ap^t & is de injuria &c. Esp. 317. 1 Bac. 155. 5 Com. 354.
If Def^t pleads son. ap^t & c. & Def^t can justify the ap^t he must reply
it specially. for he cannot give his justification in witness under
the gen^l ap^t de injuria &c. Esp. 317. Com. 288.

Matter of excuse
may either be pleaded or given in witness. Esp. 317. Bul. 17. Gal. 637.
4 Mod. 404. sup. as inevitable accidents.

To the plea of molliter
manus &c. Def^t may reply de son tort almesum. which in effect
is a denial of the justification. scilicet an avowed battery.
aliqui hoc molliter &c. 5 Com. 356. Skin 381. Lutw. 1436. Com. Pl.
312. 16.

Def^t not confined in proof to the time laid in the de^t. may
have any batt^t. but barred by st. of limitations. So the special
plea must cover all the time, must be as broad as the de^t. 5 Bac.
206. 7. 1 Bul. 138. 2 Sav. 295. Cro. Jac. 228. Hob. 104. Ray 229. 31
Esp. 407. 15. 319. 21. 282. Sal. 222. Co. L. 283. Cro. E. 32. Bul. 17. 2 Bac. 79.

And Def^t answers to prior & subsequent time when he pleads son. ap^t & c.
scilicet not. Bul. 17. Platt. ap^t 447. for proof of Def^t al^t. an any
day is suff^t. Def^t is driven to a novel assignment.

Further plea sh^d
be as broad as the de^t. as to the subject matter. i. e. sh^d cover the
whole injury. Esp. 318. Ex. Def^t charges ap^t Batt^t & wounding
a felon. marching the batt^t. but the wounding is ill. Cro. E. 268.
For ap^t de injuria covers the whole grievance. Esp. 318. for the words
that Def^t make an ap^t. total Def^t. then either defended himself
if any one age a hurt. it happened &c. basis of molliter manus.

that does not answer the allegation of wounding.

In justifying found.

as on the relation of husb^d & wife, Just. &c. the ap^d &c. must be assumed to have been made to prevent injury to &c. not by way of revenge. Esp. 318. 2 Rep. 62. n. 2 Root. 346. Stra. 959³. Wife cannot plead alone, husb^d must join in all cases. Esp. 318. bio. H. 239.

A former record of damages

ag^t Def^t or another is a good bar. bio. E. 30. Esp. 319. 216. Sal. 11. bio 579. 4 Bul. 20. Yelv. 68. 5 B. c. 185. 1 Com. 111. 2. for the sum certain damages, or reduced in "non judicatum", which takes away &c. 4 B. c. 118.

Satisfaction not necessary. Mr R.'s reason is, that in case of torts damages being uncertain, Plff might multiply actions in hope of obtaining more. In case of contract, the sum being certain he has no such inducement. - if the orig. Def^t is solvent.

The rule holds even if further damages accrue after the first recovery. Esp. 319. Sal. 11. for the bal^d is the gist.

So in

Tresp. qu^d. a former record is a bar to all continued trespasses committed before the date of the first writ. 2 Root. 230.

In this act as in all trespasses if the injury is done by seal^d the Plff may sue all or any. Esp. 317. 5 T. Rep. 651. Release to one is release to all. Est. 415. Hob. 66. As to severing damages each^d contradictory.

If two or more are charged jointly & are found guilty jointly, i. e. each guilty of all. They cannot sever damages. Esp. 320. 420. 5 B. c. 2790. Cantab. 19. 11 Co. 5. Inst. 317. pl. 10. bio. 118. Tho they plead severally &c. - so if joined & goe ag^t both by default damages cannot be severed. Esp. 320. Stra. 422.

If Def^t sever in

in this case e.g. one pleading the just issue. another a justification &c. Jury may even, tho the sev'l. Def'ts are supposed equally guilty according to Esp. 220. 2 Stra. 1146. 7. 9. Cases. Com. 11 Co. 6. 7. But. 20 Geo. 2. 348. 350. Carth. 19. Geo. 2. 860. Nov. 66. 9 Geo. 79th Stra 910. Geo 2. 384. 118. com Esp. 321. 1 Samud 207. n. That the damages cannot be severd. 5 Bur. 2792.

But in the case where damages ought not to be severd Plff may prevent Def't. from arresting judg^t or taking Error by submitting an ap^d. striking judg^t for over only. There can be only one res^t in these cases. But. 20. Carth. 19. 11 Co. 7. & res^t goes only ag^t the one ag^t whom it was assepd Carth. 20. But. 20. 1 Samud. 207. n. Geo 6. 239. 43. If Plff will enter a nolle pro. as to the other or without a nolle pro. he may take judg^t for the greater damages ag^t both. Plff may arrest judg^t if he chooses or he may enter a nolle pro. as to one Def't. strike judg^t ag^t the other for the one assepd. But. 20. Geo 6. 175. 6. Carth. 19. Nov. 70

3^d It is said that the Jury may in tripe. find one guilty as to one part & another as to another & severally assepd the damages. & the finding will be good. Esp. 420. Geo. 6. 860. without submission - plea supposed to be just issue. Then they are not found jointly guilty. (11 Co. 5. 7. com) unless the sev'l. Def'ts are found guilty (of diff't. facts) at diff't. times. This qualification adopted by our Sup^r. Court. Geo. 6. 54. & But. 20 accord with 11 Co 5. 7 in this qualification. arg^t when the injury is an entire Ball^d. Jury cannot sever because the wrong was indivisible. R. 4. 434.

First rule is adopted in this state. i.e. if two Def'ts are jointly charged & found guilty. i.e. each of the whole, damages cannot be severd. If one is compelled to pay the whole, no contribution in law or equity. Kirk. 116. 8 V. Rep. 186.

In Eng. it has been holden that a nolle pros. is a nonsuit as to one of sev^l def^s. before Indg^t ag^t the others, discharges the act as to all - it operates as a release to the one. Hob. 70. 180. Bul. 20. Benth. 19. Bro. J. 173^d con.

And in Eng it has also been holden that the Ct. will give Plff leave to strike the name of one out of the dect^s & then proceed to implead him as a witness. Rule: When the other def^s wish for his evidence. Bul. 285. 2 B. & C. 287. 6 Sid. 441. If no evidence ag^t him he may be sworn. If any at all, sworn. He must then be tried before he can testify. The court may, at a verdict as to him be first taken.

All causes of action arising in delict or the named trespass or case - are several. 5 T. Rep. 651.

The Jury may if they please vary from the dect^s & find only a part. Rule common to actions of Tresp. in quod. Esp. 421. 2 Roll. 684. Bro. 6. 39. 54. E. & guilty of Ball. not of wounding.

^{Pro} finding
more than is in issue is idle - if there has been a mayhem, the court may on view increase the damages at their discretion. Altho no mayhem is expressly laid in the dect^s if the judge certifies or reports it. But it must be done in bank. Plff must be present when motion to increase is made (the manner of wounding sh^d be laid in the dect^s infra). Founded on the rule that in the appeal of mayhem "mayhem or not" is to be tried by inspection. Esp. 322. Ray. 176. Lutetia 233. 3 B. 332. 3. 1 Sid. 108. 1 Will. 5. It must be proved to be the same hurt for which damages were given by the Jury. Bul. 21. Esp. 322.

So damages increased in case of wounding. Esp. 322. Ray. 176. L. of

atrocious ball^d 3 Bl. 333. manner of laid in the dict. Damages not increased in these cases if the Judge who tried the cause declares himself satisfied with the verdict. Esp. 322. 1 Wils. 5.

^{3th} The jury cannot give more damages than are laid. 2 S. 420 Cro. J. 297. But if they do Plaintiff may have judgment on submitting the verdict. 21. 10 Co. 115. 1 H. Bl. 643. 4 Mac. 265.

Every ass^t. de is a public as well as private wrong. 1 Bac. 156. 1 Hawk. 134. 3 Bl. 121. 4 ib. 145. Punishable by fine & imprisonment. 4 Bl. 216. "Public wrongs" direct ass^t. de a distinct kind of offence under H. C. 338. So the remedy is distinct from that in other ass^t. de. S^{ts}. may be joined when the direct ass^t. de is by several. Kirk. 108.

① Action of *Trespass vi &c.* For False imprisonment.

Every unlawful restraint of our liberty is rather a violation of our right of locomotion is false imprisonment. 3 Bl. 127. Esp. 326. Ex. illegal confinement in a private house, strait &c. 2 Inst. 589. 5 Bac. 169. Finch 202.

Two requisites — first detention of the person. 2^d unlawfulness of the detention. 3 Bl. 127. 2 Inst. 589.

The unlawfulness consists in want of authority. Aultth may arise from legal process. Esp. 333. Salk 208. Or from special cause amounting from the necessity of the case to justification. 3 Bl. 127. as the arresting of a felon by a private person. Esp. 334. It lies not for the crew of a ship captured as a prize tho she proves to be no prize. the law of nations. Doug. 572. Aberrantly jurisdiction.

But every arrest of a person for a civil cause, without legal process is unlawful restraint. 5 Bac. 169. 2 Inst. 512. A custom to imprison without legal process is not good 5 Bac. 169. 2 Jon. 147.

e. g. private person not guilty of false imprisonment by confining a person duly arrested at the officers request. 5 Bac. 169. pl. 24. 2 Role. 561. Dec^d that an off^r having made an arrest on final process cannot delegate his rights of custody in his own absence. 1 B & P. 24.

The most common case are those of arrests under void process.

If a court of record is guilty of corrupt practices / as imprisoning thro malice; the Judge is not liable to an action if he acts judicially within his jurisdiction. Esp. 326.

Sal. 396. Comp. 172. Esp. 635. 1 T. Rep. 503. 13. 4. 534. 7. 2 Bl. R. 1114.

In Eng. a judge of a Ct. of record of genl. jurisdⁿ is not liable
it seems for any judicial act, whether it happen thro' mis-
take or malice. if he confines himself to his proper jurisdⁿ.
Esp. 320. 12 Co. 234. Sal. 396. Ray. 467. Comp. 172. 1 T. Rep. 503. 34
5. 7. 8. 513. 14. 2 Bl. R. 1141. Where all the cases are cited, -
no loss in this can admitted arg^t. this "voluntary involunt"
presumption" in favour of the judges integrity.

But it seems if
a court of record of even genl. jurisdiction, has not jurisdⁿ
of the subjects matter. Judges are liable for them they do
not act judicially. 10 Co. 76. 6. 1 Hawk. 86. 59.

But if they have jurisdⁿ of the subject matter & in their
proceedings transgress their jurisdⁿ they are not liable, seem.
In 10 Co. 76. 2 Bl. R. 1145. Sal. 396. E. g. awarding a capias
arg^t a Peer in a civil cause.

Courts of limited jurisdⁿ,
tho' of record seem to be liable if they transgress their juris-
dictⁿ even by mistake. 6 T. Rep. 412. 2 Bl. R. 1145. Ray. 454
1 Sal. 396. Sta. 993. Esp. 331. 8 Co. 114. Aliter if they do not
exceed their jurisdⁿ 2 Bl. R. 1115. but liable for malicious
acts. They bring of record. Esp. 326. Sal. 396.

Ct. not of record
as Justices are liable in Eng^d at C. L. for any mistakes in
judg^t Sta. 711. Cro. C. 286. 394. 1 Bl. 354. 1 T. Rep. 536. Esp. 339.
1 Ben. 395. In which they transgress their jurisdⁿ 2 Bl. R. 1145.
in some respect. But this rule is contradicted by several oth^r
Esp. 338.

But the Ct. of B. L. will not grant an information

against a justice who appears to have acted uprightly. 1 T. Rep. 653.

Courts which can fine & imprison said to be courts of record
Reg. 467. Sal. 200. Coarth. 291. 3 Bl. 25. 12 Mod. 386. Deemed to
be universally true 2 Bl. R. 1146.

As to arrests of persons not
liable to arrest, and arresting Ex. or adm. for debts due from them
i.e. unlawful except on a suggestion of desertion. Esp. 326.
2 Bl. R. 1192. 3 Wils. 368.

False imprisonment lies in this case agt.
the Act. or the mag. Plff. (is) the rule is genl. that the Act.
who is instrumental in causing an illegal arrest is liable with
the principal. 3 Wils. 345. 77. 2 Bl. R. 1192.

In this case, the Off.
could not be liable, since the subject matter being cognizable
by the person being amenable to the court 13 Co. 76. 3 Wils. 385
Esp. 391. 1 Lev. 95. Sta 710. provided the court is of genl. juris-
diction

Exemption from arrest are sometimes, in Eng. connected
with the character of the individual, as Ex. to sup. some-
times it arises from temporary circumstances or from peculiar
privilege - as attendance on court or a writ. a writup. 4
Barr. 475. 4 Bac. 222. 2 Roll. 273. 1 St. Bl. 636. In the latter cases
the arrest is not illegal in the first instance - but a superadded
if any. 1 Bac. 222. 8 T. Rep. 534. 2 Bl. Rep. 1113. 42. 4 T. R. 377. after
which detention is illegal & actionable. 5 Bac. 171. Cro. J. 379. Doug.
649. 59. Now as to the off. or the Plff. only? Doug. 652. 4 Bac. 684.
685. F. N. B. 236. 6 Co. 52. Corp. 9. agt. Party Plff. v. 3 Barr.
97. What is said by Buller J. Doug. 652. must relate to an
action after the superadded, in the prior detention of a Person

The writ in these cases is good, writ continues. 1 Hb. 220. 2 Bl. R. 1193.

Arresting a Priv. an lificated Bnleft. off. not liable - bound to obey
the writ. party may be subjected in case Long. 646. 50. 10. Co. 76.
2u In case of tresp. 2 T. Rep. 231. Esp. 530

Privilege of auditors dis-
allowed in case of collusion. so in vexatious actions. 2 Bl. R. 1193.
11 Mod. 79. Long. 7. 1 Hb. Bl. 336 It being discretionary with the
court to allow or not. So when a party attends as a volunteer
for a sentence or with a view of answering one - when there
is none.

Party attending arbitration under rule of court is protected
adversely nor made it responde. 3 East. 89.

Doctors detaining prisoners
for fees: the prisoner entitled to a discharge: not false imprisonment
5 Bac. 171. 2 Inst. 53.

If the order of Ct. is to confine one in a cer-
tain prison, confining in any other is false imprisonment
5 Bac. 171. Sal. 408. 5 Call. 295. 3 Sal. 219.

A peace off. is jus-
tified in arresting without warrant, on a reasonable charge
of felony, the man is committed. Long. 334. 5. pl. 73. 1 Roll. 43.
Heir of a private person - But if a felony has been ac-
tually committed, a private person suspecting another
to be guilty on reasonable ground & without malice is
not liable for arresting without warrant to carry before
a magistrate. Esp. 334. 5. 5 Bac. 171. Long 345. Post. 66. To
prevent a breach of peace or escape. 1 Butk. 150. 2 Hawk. 82
Hence if no felony has been committed. Esp. 334. Long. 345.

An orig^l arrest on Sunday in civil cases being void by H. 29
Can. 2. is false imprison^t. Esp. 327 605. 5 Clev. 95. Sal. 78. 2 Lev. 111
4 Bac. 456. 66. 1 T. Rep. 265. 2 Bl. Rep. 1195. Such an arrest good at
C. L. 2 Bl. Rep. 1195. 2 Buls. 72.

But Bail may take their print
on Sunday (holden con. as to Sheriff's bail 2 Bl. R. 1275) for he is in
nature of gaoler - print^d as print^d. Other taking by bail is retaking
on escape. Sal. 626. 3 Sal. 148. Esp. 665. Lev 2 Bl. R. 1275.

Arrest in civil
cases by breaking open the doors of Deft's house is false imprison^t. 5 Co. 98.
Corp. 1. Hob 62. 2 Bac. 367. Locus of inner door 2 McCl. 489.

444
been questioned whether if an arrest is made by illegally breaking
the house the v^{al} of the process is good. Other only remedy by act^o
or whether this v^{al} itself is void may be set aside in a sum-
mary way by discharging the person arrested. Corp. 1. 9. Esp. 606. 5
not sure. If the ct's interference is discretionary. This was a
case of breaking doors. 5 Co. 98. Hob 383. Since dec^d the v^{al} of the
process was void in case of prop^{ty} taken by breaking in door &c.
set aside 2 Bac. 367. 2 Lev. 385. 5. con. 5 Co. 91. 3.

As the last case
false imprisonment lies - case of breaking doors diff^r from case
of a suitor privilege of the party arrest at night illegal. Hob 61.
Corp. 1. 9. also questioned whether if an illegal arrest is made in
consequence of which an other arrest is made which would other-
wise be good, the latter is valid? Yes unless some collusion. 2 Bl.
Rep 823. unless if there is collusion, set aside it.

Decided then off.

by an escape warrant may retake his prisⁿ in another state 1 Rott.
107. The warrant is of no use. - As to bail from another State, 5 Co. 1672.

If an officer by mistake arrests B instead of A, he is liable for false imprisonment - even if B disclaimed himself to be A. Doug. 42 2 Hall. 552, 4 Bl. 5. Esp. 328. 3 Com. 490. 3. 2 Rev. 552. Mow. 457. And. 323. Damages mitigated Esp. 328.

Any person has a right to arrest another who is fighting. 5 Bac. 171. Hawk 136. 2 id. 81. & to retain him till his passion is over.

In certain cases, persons commit the liability to be sued with their husband's consent to be held under arrest on return process. 2 Stra. 1272. 1 T.R. 486. 1 Bl. R. 720. But there is no instance of false imprisonment in these cases. Doug. 648. arg. Can it be bro't? 2 Sal. 115. 2 H. Bl. 17. Sumbr. note. The process legal, the service is sometimes not valid & the person discharged. 2 Bl. R. 1193. H. Analogy. Doug. 648. arg. Orig. arrest not illegal.

Arresting & confining one for a short time under a habeas warrant from a justice of peace for examination is not illegal. 5 Bac. 172. Root 166. 4 Co. 268. Cro. El. 829.

A private person may with warrant confine a person disordered in mind & who appears disposed to do mischief. 5 Bac. 172.

If an officer makes an arrest on a process from the face of which it appears that the officer, supposing it had no jurisdiction, he is liable according to the extent of authority. Esp. 371. Bul. 523. Hawk. 260. From what is in the want of jurisdiction arises Ray. 230. com. 648. 20. But the rule has been extended much further.

Thus, it has been held, without any regard to the defect appearing in

the face is not? that when a court of limited jurisdiction has not jurisdiction of the cause (from whatever quarter the defect of jurisdiction arises) the officer would be liable. 10 Co. 76. 7 Co. 314. Esp. 337. Decision & reasoning in Marshalsea case Reasoning contradicted in Ray. 230. Sta. 710. 993. 509. Supported in 2 Wils. 380. Esp. 398. 9. Dicta in the Marshalsea case seems still to be law in Eng.^d viz. that when the court issuing the process has no jurisdiction of the subject matter every thing done under it is absolutely void - whether it appears or not upon the face Esp. 391. Bul. 82. 3. 1 Ventr. 383. 4. Cowp. 172. Hard. 480. Sta. 710. 2w. 2 T. Rep. 653.

But when the court tho of limited jurisdiction has jurisdiction of the subject matter & the defect of jurisdiction is from something local or personal, the officer is justified unless the defect appears upon the face of the process Cowp. 20. 5 Bac. 170. 2 Mod. 196. 1 Ventr. 369. 1 Bul. 82. 3. Carth. 274. 2 Mod. 29. 3 Bac. 233. Esp. 391. Hard. 480. Sta. 710. & according to L^d Ray 230. 1. Cowp. 220. he is not liable even in this case because the right of the right to have filed it 43. 1. 83. com. 10. Co. 76. b. 5 Co. 54.^a As to the case of common Pleas 3 Wils. 345. Esp. 329. 2 Wils. 705. 344. 2 Wils. 384. 3 Wils. 213. 6 Co. 54.^a.

Officer may, & is, under the command of the courts of Justice, tho the writ is void except when the officer has not jurisdiction of the subject matter 10 Co. 76. b. 6 Co. 54.^a. 3 Wils. 345.

When the jurisdiction is complete & the process is malicious & unfounded the officer is justified. 2 T. Rep. 231. 81. Tho the court or magistrate is liable. Sta. 710.

When a court having jurisdiction of the cause proceeds erro-

newly or improperly - still if the process appears regular, the off^r is justified. *Stea.* 710. 2 T. Rep. 231. 7 ib. 455. 3 Benc. 333. 2 Mch. 288. 3 Wils. 345.

Rule seems to be in Eng^d according to the weight of Auth^y that when the subject matter is out of the l^y jurisdiction (whether jurisdiction is gen^l or limited) process is void & officer is liable. Aliter when the want of jurisdiction is as to the person or place. - Then off^r not liable unless it appears from the face of the process, or there in case of et^r of writ. But the latter branch of the rule the true of reason, applies not (it is said) to final process (issued by inferior courts) without qualification. Ex. When an writ is under final process of imp^o et off^r justification must show that the cause arose within the jurisdiction or at least that it was so laid. B. 1. 82. 60w. 20.

But tho the process under this qualification justifies the off^r it does not the orig^l Pl^{ff}. He is bound to know the extent of the courts jurisdiction & to show it. Broken the cause of actⁿ more (see L. 314. 1st the orig^l Pl^{ff} from Pl^{ff}) is not barred by having, pleaded to the first actⁿ. Esp. 230. Bul. 83. 5 Benc. 170. 1 Vent. 369. 2 East. 260. 2 Mod. 196. 7.

Lafay 286 denies the rule, that even the orig^l Pl^{ff} may plead in this case. *Stea.* 156. 1 Vent. 286 are cited - vide 60w. 20. 2^d Ray, 286 appears in this point in bond. Rib. 111.

In some cases process is void & Pl^{ff} is liable when the jurisdiction of the Court in the cause is gone, but as to the injury & the person & place.

1. In case of limited jurisdiction, when a writ is given by et^r is not strictly pursued. Esp. 331. 8 Benc. 116. 1st 408. 1 *Stea.* 110. When a person committed Pl^{ff} for killing game the

he has sufficient assets to answer the penalty. off. is cured but the illegality of the warrant was not partial. 1 Wils. 150. Esp. 332. When a person was committed on a penalty of £13 which he offered to pay, but was imprisoned by constable till he paid the fine which the stat did not allow. Then the Constable was dep. This was for abuse of process. no question of Jurisdiction - So a g. commissioners of Bkrupt. for any commitment not warranted by their officers. Esp. 331. 2 Bl. R. 1035. 1141.

II. So in other cases the receipt of writs of Writ. or any other order from any objection to the jurisdiction of the court is called void & is. Piff in the process liable to this action. Irregularity. Ex. a. is returnable to the court but not to that of the Dist. Esp. 328. 3 Leon. 491. 3 Wils. 341. 5. 2 Bl. Rep. 845. Sal. 700. 1 Rod. 315. Officer not liable 3 Wils. 345. in this case if the process is from the Ct of Writ. the irregularity is founded upon the face of it.

III. So the single arrest was lawful yet for an outrageous oppression this action lies ag. the off. or the magistrate, if he is in fault. Ex. Warrant cruelty in confining to a dungeon without air &c. Esp. 332. 1 T. Rep. 536. General writs by military commanders. Jurisdiction of magistrate himself special.

When an off. justifies, proof that he acted as an off. is not at fact. He is not bound to show his appointment. This 1085. 3 T. Rep. 630. 2 ib. 366. 3 Macw. 285. He may not this be rebutted?

Just Rule. A single arrest is not void even if the process is void. So if a process founded on irregular proceedings. Ex. arrest on an ex. issue on a judge's set aside for irregularity. Esp. 329. 91. 3 East. 128. then 564. 1 Ray. 73. 1 Luc. 15. 1 Sid. 212.

1819, 155.

Id that the officer serving the return is not liable. Esp. 391 i.e. in case of b^t of Westminster. 1 Wils. 345. But if the b^t is of limited jurisdiction & the irregularity appears. 2 Stra 499. 4.

What an arrest on an erroneous process is good 4 Bac. 450. Stra. 509. 3 Wils. 345. Esp. 391. arg. the party may justify under erroneous process, till it be reversed. 3 Wils. 345.

Process has been held void & irregular when filled up without proper authority. Ex. Off. in Eng^d the Under Sheriff left a blank for s^t to fill up with the name of a Sheriff. Esp. 327. 2 Wils. 47. A person said here was the person serving the process. It does not appear that he knew of the irregularity. Supp. writ? Ex. Offs warrant. H. C. 24. 387.

Writ abates, when directed to an indifferent person in case the name is inserted by the magistrate - & a writ drawn by Sheriff is excepted in their own cases.

As when the process has issued informally Process out of the Vice Chancellor b^t of Oxford - Custom Orig^e Sheriff making oath of his cause of action & that he believes &c. the sworn that he suspects? Esp. 329 Stra. 472. The party &c. officer & gaoler not liable - all joining in one plea. The court adds Sheriff & gaoler might have justified. denies 2 Wils. 305.

Sheriff not liable it is said if he has not joined in pleading with the others Stra. 474. Ex. C. 114. 385.

So when the writ is not returnable on a day certain irregular Esp. 330. Ex. C. 314. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

58. Loach 21. 2 & next count "adjudg^d suff^t

Loach general con-

vants of any kind or a warrant to arrest the authors of a libel
"whom they saw. Esp. 399. 1 Hale Pl. C. 150. 2 Wils. 275. Wils. 213.

Requisites to Search Warrants. 1st Granted on oath.
2^d The grounds of suspicion declared 3 Executed in the day time
by a known officer & in the presence of the Informer 4th Directed to a
particular place ag^t the particular person or persons &c. When the
requisites are observed the Informer is justified & not by the writ Esp. 399.
2 Wils. 291. 2.

When the officer serving a process justifies under it, he need
only show the writ or process itself Esp. 333. 7. 6 Co. 52. 2 Roll. 513.
That it is returned if under process 2 Stra. 1184. Cowp. 20. & the
return day has arrived. — In Eng^d Sheriff deputy not obliged to show
his return — because not in his power. But the necessity of an off^r
showing a return obtains only in under process. Cowp. 20. 3 Co. 90.
4 Co. 67.^a 1 Wils. 17.

But if orig^l Diff is Def^t he must show a judgment
as well as writ in final process. Esp. 333. 2. Sal. 408. 9. for judgment may
have been entered before the arrest & orig^l Diff ought to take notice of
it

Same rule when the actⁿ is ag^t a mere stranger, who procures the
service of process for another — does if he acts in aid of the off^r for
his agent.

If a Sheriff does not return a writ when he ought to do it
(or makes a false return) he may be treated as a trespasser ab in-
itio. 5 Barn. 581. 2 Roll. 503. 5 Bac. 102. Sal. 409. Ray. 632.

Tho this is mere omission for the return is necessary to complete and
validate the act

If orig^l Plff & off^r are sued together they may sue in de-
fending & if they join the plea of justification is insuff^t for
Plff. it is so for Off^r Esp. 336. Stra. 993. 1784. 509. So converso,
if the plea is not good for Off^r it would be for orig^l Plff. he loses
his defence by joining. 1 Wils. 17. Co. Off^r does not show the re-
turn of process to whom he ought to do it.

Procuring, command^g,
aiding, assisting makes one a party but happens. Co. Lit. 57. 1 Mod.
409. 2 Hawk. 512. Servant keeping the key of a room knowing
one is imprisoned in it is guilty of false imprisonment.
3 Wils. 377. 5 Com. 279. Co. Lit. 57. a

Procuring even a foreign
Prisoner, this plea, to imprison one is false imprisonment in
procure. 2 Bl. Rep. 983. 1055. —

Trespass for injuries to personal property.

Trespass in its most extensive acceptance at C. L. is any transgression of Law short of Treason Felony & Imprison of &c. When not considered as a word of technical import it is any violation of any law 3 Bl. 248. 5 Bac. 157.

The word as now used in Law denotes in its greatest sense any misfeasance committed to the injury of another person or prop^y. Esp. 385. 5 Com. 574.

The word in its most appropriate sense imports only injuries by force to the real or pers^l. prop^y of another. Esp. 380. The trespasses now to be consid^d. comprise all forcible injuries to the pers^l. prop^y. of another.

The rights of pers^l. property in pers^l. liable to two species of injuries. 1st Abuse or damage while the prop^y of the owner continues. 2^d Detention or deprivation of prop^y. 3 Bl. 145.

1st of abuse. of pers^l. prop^y. without altering the possession. Ex poisoning ones cattle - Kissing his horse a doing any act which takes away from the value of a chattel. falls under this description of Injury 3 Bl. 153. So if his timber floats &c.

The remedy in these cases if the act is accompanied with force is immediately injunctive

is by *Tresp. vi. & armis*. 3 Bl. 153. 5 Com. 582. 2 Roll. 556. l. 17. Esp. 598.

If case is bro't when trespass is the proper remedy. Judge's annotation
vice versa. 6. 7. Rep. 125. 2 Mod. 131. Bro. 6. 141. 96.

2^d Of Amotion or deprivation of prop^y. This kind of injury so
far as it is remediable by *Tresp. vi. & armis*. consists chiefly in
an unlawful taking (an unlawful detainer being chiefly
remedied by *Detinere* or *Trove*) 3 Bl. 152.

The action of *Tresp. vi. & armis* gives damage, not restitution in specie 3 Bl. 151. It lies not
for taking a ship a goods or prizes tho' the prop^y has been ad-
judged no prize. For the question depends on the law of nations
it is triable in the Admiralty 6th only. Long. 572. 98.

But in
some instances when the orig^l taking is lawful, *Tresp.* lies
for subsequent injuries. Esp. 381. E. g. If a beast is taken on an estray
& afterwards lost or sold. *Tresp.* lies. As if the trespasser ab initio. Esp.
383. 405. 5 Com. 581. 3 Mod. 20. In some cases *tresp.* lies not.

Rule When the auth^y to do the orig^l act is given by law, an abuse
of the auth^y makes on a trespass ab initio. Esp. 383. 405. 5 Com. 581.
2 Bul. 81. 2 Bl. 1201. 5 Bac. 161. 5 Co. 146. a. 2 Roll. 561. Yelo. 96. 7. 1 Burr.
36. 3 Wils. 20. Barn. 20. 1 Show. 12. Ev. of an estray sup. 1 T. R. 12.
Fal. 221.

So if one enters a tavern & afterwards steals, he is a
trespasser in entering by relation! 8 Co. 146. Case of real prop^y.
So if a sheriff does not make a return of a writ when he ought
to. Ex. mun. process. 5 Com. 581. 2 Roll. 563. l. 15. 20. 5 Bac. 162.

But the subseq^t of right thus given by law. must be a position

misfeasance - not a nonfeasance. Ex. case of a Taverner, sup.
where the thief stole - but he would not have been a trespasser ab
initio for refusing to pay the Taverner for entertainment. Esp.
383. 5 Bac. 161. 8 Co. 146. 2 Buls. 312.

So if one having taken a
distress lawfully, refuses to deliver on tender of sufficient
5 Co. 581. 2 Roll. 556. Distress of goods &c. when the injury is
remedied by law. 1 Rob. R. 130.

Exceptⁿ to the rule in case sup
of the Sheriff who omits to return a writ &c. 5 Bac. 162. Sal. 409
Ray. 632.

When the party gives the license under which the
orig^l act is done, the other can never be made a trespasser
by relation. Perk. sec. 191. 2 Senter. 64. 2 Roll. 561. 8 Co. 146. 4 Plow.
96. 7 For the law will punish him for abusing the
very act which was authorized by itself, yet it will not al-
low a party to treat that as unlawful which he himself
made originally lawful. 5 Bac. 162. pl. 22. Ex. Unlawful
distress, abuse by Bailie &c. 5 Co. 581. con. same. 5 Bac
162. pl. 20.

If indeed Bailie destroys the thing, trespass it is
said, lies, for he extinguishes the Bailment - but he is not
a trespasser ab initio sensu Litt. 3. 71. Co. Litt. 57a 5 Co. 3.
allod. 248. 5 Bac. 266.

To maintain this action T^l must
have possⁿ - possⁿ alone is not suff^t. Esp. 383. 4 T. R. 489.
Ex. T^l let a house & furniture to d. - pl^{ff} brot^t trespass.
adjudged not to lie - pl^{ff} not proposed - it should have been
trown. 1 T. R. 486. Now holden that T^l will not lie
7 T. R. 9.

What construction prop^r is against a stranger suff^r 5 Conn. 577. 8.
5 Bac. 164. As Bailor 2 Roll. 569. L. 5. 1 T. Rep. 480. 2 ib. 489. 749.

So generally any person having the genl. property may maintain
trespass ag^t a stranger - For it draws to itself a prop^r in
law. 5 Bac. 164. 5 Conn. 578. Latch 214. 2 Buls 268. 1 Sid. 238
2 Roll. 569.

The agister of Cattle may maintain Tresp. ag^t a
stranger for taking them. 5 Conn. 577. 2 Roll. 551. L. 25.

The
genl. prop^r contemplated by this rule must suppose a right either
absolute or conditional of present prop^r. As in case of Bailor
to emp. Parvane &c. aliter it is contrary to 4 T. Rep. 489. 1 St. 480
Esp. 388. Suppose the case of a hire for a certain time.

So he
who has the special prop^r in goods may bring Tresp. 5 Bac. 164
1 N. B. 89. 92. 60. Lit. 89. 2 Buls. 84. 2 Roll. 569. Same genl. rule as
in Discov - Bailor & he may both maintain the action.
2 Saunders. 47.

If Bailor delivers the goods to a stranger. Bailor
cannot maintain trespass, tho in some cases he may recover. 5 Bac. 164. pl. 18. 175. pl. 30. And, if Bailor has only the
bare custody as a serv^t 5 Bac. 175.

If the prop^r is given to one,
he may maintain trespass before he has taken prop^r. 5 Bac.
164. Latch 214. pl. 13 for prop^r draws a prop^r in law.

If goods
of Testator are taken away before the will is proved he
may maintain Tresp. after proving the Will. 5 Bac. 164
2 Buls 268 1 T. Rep. 480. He has by relation a constructive prop^r

from Test^r death. His right is from the Will not the probate.

So legatee of specific goods may maintain Trasp. for taking after Ex^r's assent - tho it be before delivery to him by Ex^r
5 Bac. 164. Aliter if the legacy has been "of a third part of Testator's goods" not specific - And in the first instance, Mr Rieu supposes Trasp. would not lie if the taking was before Ex^r's assent to the legacies. 1 T. Rep 480.

In Trasp &c. for goods taken belonging to two, both should join - but the defect is, pleadable in abatement only. 1 Burr. 12 Sal. 32. 3 Lev. 354. 1 Roll 31. Esp. 586. 411. Sal 2. Lit. 323. Star. 810. As Robbery &c. Larceny &c.

It seems that at C.L. Trasp. does not lie for an act amounting to a felony as Robbery &c. by reason of Muzg. 5 Burr 582. 5 T. Rep 5 Bac. 176 1 Lev. 21. 47. 1 Burr. 130. Yelv. 90. 1 Sid. 375. 2 Roll. 557. 1 Mod. 383. 1 Bos 148. Latote 144. c. 82 English antith. contradictory as to the application of this principle - No such principle here. Allegor founded on perpetration. remitt. 2v. Star. 873. Ray. 1572. 3 T. R. 170 arg^t. con. Bul. 131.

If a thief or under thief takes the goods of one on ex^r's arg^t another thief liable in this action. Doug. 20

In describing the goods must be described with accuracy & certainty. Esp. 405. 6 "Divers goods" or "Diffs goods" not suff^r nor cured by verdict. For an error would not be a bar to another & defect could not justify. 2 Ray. 1-10. 4 Burr 2405. Star. 637. 5 Co. 35.

But this rule applies only when the action is founded on the taking of or injury to the goods themselves.

not when the injury is laid by way of aggravation. There "Plff good" generally is suff^t Ex. Tresp. for breaking & entering Plffs house & spoiling his goods. suff^t even on spec^t Damnum. Esp. 406. 3 Wils. 292.

Tresp. for breaking & entering house & expelling plff. requiring only an aggravation unless Plff make a mere assent of it as a substantive tresp. base of novel assigment. 1 B & P. 230. 3 P. Rep. 292. 1 Wm Bl. 555. 1 Vent. 211. 2 Wils. 313. 3 A. 20. 4 Bac. 12.

So a gen^l description is suff^t if it is made more certain by reference to other things in the deed. Esp. 406. See Keys for opening the house aforesaid. Sal. 643. 1 Vent. 114.

^{the intent}
of a, immovable nature &c. may be laid with a continuance. Esp. 316. 407. 8. Sal. 638. Key. 239. otherwise "diversis diebus". 3 B. 212.

Laying with a continuance when the acts lie not in a continuance not cured by verdict - Unless some of them lie in continuance. Esp. 418. Sal. 639.

Plff must state prop^y or interest showing a right of prop^y i.e. either an actual or constructive possession. Esp. 406. 383. Sal. 640. 'given Plff herein not sufficient. Geo. I. 40. 4 P. Rep. 490. 1 id. 480. 2 Lw. 156. 'Taking' hay from Plffs land not suff^t dict^y. This case not good even after verdict - Value must be stated Esp. 404. 5 Bac. 170. 1 Sid. 39. 2 Lw. 430 Geo. I. 129. 5 Com. 349. 2 Vent. 174. Esp. 588. that value need not be alleged in Plevin admitting amount of value cured by verdict. Esp. 402. 5 Bac. 196. Sid. 39.

Pendency of an action

against some party or parties for same trespass is a good plea in abet.
5 Co. 61. 1 Com. 49. O. 110. 1 Bac. 13. Conth. 76. Licet. if the same action
for same trespass is ag^t a stranger. 1 Com. 50. Hob. 138 2 Bac. 48.
49. Sta. 420. 5 Bac. 192. pl. 15.

Defendant not material - Plaintiff
prove trespass at any time not barred by stat of Limitations. Esp.
407. 15. 319. 21. Bul. 17. Ray. 231. Co. Lit. 283^a Cro. E. 32. Hob. 104.
ergo. if a release is pleaded Def^t must traverse as to the subseq^t time
Vis 415. 5 Bac. 106. 7. Bul. 38.

Def^t by way of aggravating damages
may lay in his dectⁿ things for which he could not have an
action. Esp. 207. T. R. B. 196. Sal. 119. 1 Sta. 61. 1 Keb. 787. Qu. is it to
aggravate damages. Esp. 317. Sal. 642. 1^a Ray. 1032.

If Trespass is
committed by several; pl^{ff} may declare ag^t one or more or all - so
ag^t each one separately. 5 Bac. 192. 3. Sta. 420. As to severing
damages sub. 'ap^t & Ball^l'

If one judg^t one is compelled to pay
the whole he cannot oblige the others to contribute. Rule com-
mon to all torts. Hurd. 154. 8 T. Rep. 186. Kirk. 116.

But if it appears
from the dectⁿ that the Def^t with another person contrive &c
the dectⁿ is ill for not joining the latter - 5 Bac. 192. 3. 1 Leon.
41. Hob. 199. Qu. as to the principle. Torts being several and
Def^t pleading or showing the fact does not hurt the dectⁿ Sta.
420 Hob. 199. unless if the Def^t (other) is not known.

Justification
must be pleaded. Esp. 411. Co. Lit. 282. Sta. 61. If justifi-
cation pleaded by one of sev^l shows upon the whole Pl^{ff} had no
cause of action. Judg^t cannot go ag^t either, even if one

is defaulted or found guilty. Ex. a license pleaded a gift to
Esp. 421. 1 Sha. 610. Rob. 54. Ray. 1372.

In Eng? "rei et annis"
are words of substance, for at 64. the judg^t in case of per-
cible injury was a capias pro fine - in other Plff paid a
sum of money in taking out an writ & the judg^t was a mis-
recordia. (4 Bac 11) Fine, Annuit. 860. 39^a Emipion after
the Judg^t Est. 408. 5 Bac. 191. F. N. B. 176. Sal. 636. Cro. 407.
Cro. 443. 526. 36.

Now the writ of capias pro fine is taken
away by St. 5 M. & L. But the Plff pays a substitute on
signing judg^t in actions for injuries with force. viz 6/8. or
go the name of the rule continues. 5 Bac. 191. Sal. 636. 4 Ray.
985 con.

"de contra pacem" are words of substance in Eng? 5 Bac. 192.
Esp. 408. F. N. B. 93. Barth. 66. Sal. 636. Cro. 426. 43.

These defects
aided by verdict & shall be amended. Esp. 408. Sal. 690.
by St. 16. 7 Car. 2.

Decided in bar. nearly 30 yrs ago. that Trasp
& Case might be joined in one dict - no late decision. - At 3. 2.
such a joinder would be ill because diff^t Judg^t would be
in company. 860. 39. Now the capias pro fine is taken away
by St. 5 M. & L. yet the criterion has still been the difference
a summons for the Judg^t 3 Wils. 321. Case for negligence &
for misfeasance may be joined in Traver 3 Wils. 319. Trasp
& Traver not joined. same 2 Wils. 322. 1 T. Rep. 274. In bar
the rule as to costs may be diff^t as to the two causes of action
2 bar. 268. 9. The identity or difference of the Judg^t not
an universal criterion. But when the judg^t & jury?

if we are the same, they may be universally joined. 1 T. Rep.

274. 4 ib. 347. 5 Bac. 191. 4 ib. 11. Gro. 3. 20.

Trespass on the Case.

Arising as delicts for injuries to the person & personal property.

This action lies for wrongs not accompanied with force or acts which the act possible are injuries & culpable neglects & omissions. But. 74. & for consequential injuries occasioned by acts which are forcible. Ex. of first kind of wrongs. Trown. Malicious prosec^r. Hamlin. Malicious process. 2^d Neglect in a Boiler. Savt. Officer &c. Ex of 3^d Kind. Injuries occasioned by actions usually called trespass. *hargr. 13 Bl. 122. 31 Esp. 598. 11 Mod. 180. 1299. 1402. 2 Bl. Rep. 895. 3 M. 153. 4. 208. 9. Est. 645. 2 T. Rep. 167* Throwing a log into the road over which one falls &c. Digging a ditch into &c. *Star. 636.*

Acts of Tresp. on the case are generally founded on the Eq. of the 4th of West. 2. 3 Russ. 4. 87. 243. 3 Bl. 5th M. Cases were known at 6th Russ. 3 Bl. 123. 8 T. Rep. 129. 2 Bac. 245. 2 Lio 20.

In law, the forms of declaring & commencing an action make a distinction between actions on the case & actions of trespass on the case. Ex. e.g. we call an action on the case. Trown trespass on the case. first class arising ex contractu. 2^d is delict. Eng. list. law knows no such distinction. Assumpsit is Tresp. on the case. 3 Russ. 4. 225. 394. 3 Bl. 208

If case is brought when trespass is the proper action. *Subj. 11 Mod. 6 T. Rep. 125. 2 Mod. 131. L. v. 61. 11. 96. Reason 5 Bac. 171. 3. 4. 11. 2 ib. 506. & c. concurre.*

When there is no force in transact. no difficulty - law always - When the right not working an injury is with force Tresp. lies in some cases in other case. Rule If the act is immediately injurious

Trop is the proper remedy. As Battl. of ones self - false imprisonment
i.e. destroying property with actual force &c. - But if the
injury is consequential, base seems to be the proper act - as
throwing a log into the highway over which one falls &c.
Loss of service from a battery of ones servant child &c. 3 Bl.
208. 9 C. 2 Rep. 123. 5. 53. 4. 5 ib. 648. 2 Bl. Rep. 1055. - 1 Com. 204
3 Reeves 4. 224. 3 Wils. 313. Bul. 2679. 2 L. Ray. 1399. Sta. 636
Bun. 1114. 2 T. Rep. 231. Ray. 407. 2 Bl. Rep. 892. In the last
case the action is usually called Trop. & Trop. holds to be the
proper action 2 et. Rep. 476.

Difficulty in applying the rule -

The effect need not be instantaneous to maintain Trop. When
it is instantaneous, Trop. is the only proper remedy.

Suppose where
not the instantaneous effect of the origl. force and in some
cases remedied by Trop. - In others by base. When the im-
mediate cause of injury is but a continuance of the origl.
force it not being in any measure produced by the vol^t
intervention of any rational agent. the author of the
origl. force is not liable in Trop. for in law he is the
author of the whole force - The ultimate violence is his
the injury is consid^d in law as the immediate effect
of the origl. force.

But when the origl. force ceases before the in-
jury commences (as is always the case when the injury is
produced by the vol^t intervention of rational agents & in
many other instances) the author of the origl. force is liable
if at all, in base only. For here the ultimate force is not
his act. The injury is not consid^d in law as the effect of
the immediate force. Exst A ball shot of across 10 times that

W. 2 Attacks a foot ball. B kicks ag^d C.

Ex. One shoots a ball which after glancing 10 times hurts A's wrist. The bodily hurt is in law the immediate effect of the orig^l force for the proximate cause or ultimate force is but a continuation of the orig^l force or causa causans. Hurt^d therefore has Trasp. A's injury is not the immediate effect of the orig^l force (it is not indeed the purely physical force) The immediate cause of the injury to A is the causa causans. the physical hurt done to the hurt^d. A's proper remedy therefore is base & actions by Masters in such cases always have been substantially, as on principle they ought to be base. 2 T. Rep. 167. 8 E. 645. Sal. 206. tho they have been called trip. 2 A. Rep. 74. 831. 3 Wils. 8. 11. 2 T. Rep. 167. 2 A. Rep. 446. 7. 3 East. 599. 2 A. Rep. 276. that the master's remedy is Trasp.

A throws a stone which bounds on or t in bounding hurts B. here the vis impessa continues without intermediate rational agents &c. has triasp. - So if it bounds 100 times. So if one throws a log in the way or road & in throwing it hits one. 5 T. Rep. 648. Stra. 636.

But in the case put by Bl. J. of a foot ball, base would be the remedy - A's shot at a man glances & wounds - Trasp. lies - So in the agent's case - So in turning out a road or cutting thorns. Giffens v. Ray. 2671 In these cases the injury is the immediate physical effect of the force continued & not aided by intervening free agents. - But if a log is thrown into the road & a falls over it. base lies - not the effect of the orig^l force continued. base. J. 246. 1 Com. 202. E. 577. 6 W. 6. 10 - So in

case of the spurs *Stea.* 636.

1 *Went.* 295. Case for riding a wild horse which ran over *Piff* - 1 *Conn.* 208. Here, surely, *Deft.* was not excused as agent so far as related to the force. 2 *Ch.* 172. 2 *Bl. R.* 899. 2 *Ch. Rep.* 117.

Deft. caught the driving negligently ran with force & agt. *Piff*'s horse - Case adjudged to him (not allowed by the act of *Deft.* 3 *East.* 593. The *Jury* did not describe the force as the pers. act of *Deft.* 8 *T. Rep.* 188.

If I dig a trench in my own land & direct a water course from my neighbors the injury is the physical effect of force - Yet Case not *trasp.* lies - Here the proximate cause is negative, viz - failure of the stream, *neg.* not a continuance of the force. 2 *Wils.* 174. *Esp.* 638. *Stea.* 5. 638. 9.

If a servant in performance of master's business commits a direct injury with force 1 *East.* 100/ negligently is *Trasp.* or Case the proper remedy agt. master? 1 *Bl. R.* 472. 10. *T. Rep.* 125. 2 *Bl. R.* 442. *Sol.* 441. 5 *T. R.* 649. Case sent *Stea.* 1083. 7 *T. Rep.* 279. *Burr.* 2093. 2 *Ch. Rep.* 446. *Deft.* ran over *Piff*'s boat with force & negligently of *Deft.*'s pilot. Case the proper action - not the pers. act of *Deft.*

If a willfully runs his vessel agt. *Deft.*'s *trasp.* lies. If by negligence case lies - Injury immediate in both cases - It is his act in the former case - not in the latter. 8 *T. Rep.* 188. Cases of mischief by our dog to host 3 *East.* 593. Negligent driving carriage. *Trasp.* agt. driver 2 *Bl. R.* 444. If the servant does it willfully without an order from master not liable 1 *Went.* 106. 1 *Conn.* 204.

In case, but of topping trees, cutting thorns &c. The force is continued, it is one continued act of force. Base of spout altered. - for erecting the spout does not cause the rain, not continued force, indeed before the injury took place

cutting down a head of water &c. is *Prisp.* it is like pouring water on *Diff's* hand - an continued act of force.

When can *liis* for injury accruing in consequence of an act of force, the right act may be laid to have been done in it unless the act is can more descriptive. *sent. 3 Revy* *Ch. 244.*

Whether the right act was lawful or not, the criterion. *2 Bl. Rep. 892.*

Said that can not *Prisp.* *liis* when the act was right. lawful. *Ex. Spout* can *the 636* not correct base, but of cutting thorns &c. *2 Bl. Rep. 899.* meaning *Prisp.* *liis* not when the wrong act was not right the force. *tc. 3 Bl. 154. 5 Com. 588. 2 Roll. 556. l. 17.*

This act *liis* for a great variety of non & mispragance. *1 Benc. 44. 3 Bl. 52. 122. 1 Com. 132. 234* Many of them have distinct titles. *Trown. 4th Standard.*

at more neglect for which this action lies on the ground of delictum must be a neglect of duty imposed or required by law. *Ex. 597. Ex. a finder of inchoate is not bound to look it safely - if it spoils this neglect he is not liable. *See L. Ray 717. 1 Cor. 6. 252. Rev. E. 219.**

Thus for negligence in his office a *Diff* is liable; so are other officers & private persons

in many cases. 1 Com. 206. 7. 9. 1 Roll. 93. In Com. a bluff
would be liable for not selling the prop^y taken in crops. In
Eng^l he may return that it remains in his hands. propter de-
fectu^m emptorum. 3 Bac. 366. Sal. 233. 1 Bd P. 360.

A person
performing business for another in the line of his profes-
sion & doing it carelessly or unskillfully is liable in this
action but if this business was not professional, he is not liable
for want of skill unless in case a special agreement. tho
for negligence he is. 2 Kay. 214. 2 Wils. 359 Esp. 601. But
in case of an undertaking in Physic or Surgery it
seems that now less the persons undertaking make the practice
of &c. a common profession; they are not liable even for neg-
lect without a special undertaking. 3 Bd. 122. 66. Esp. 601.
1 Com. 165. folly of the patient.

It lies in questⁿ ag^t any
one by whose act or culpable neglect, the health of another
is impaired. Ex. It lies ag^t the seller of bad wine, which
has injured another's health. So for exercising a noxious
trade producing the same effect. Esp. 610. 1 Roll. 90. 5. 3 Bd.
122. 1 Com. 166. 70. 9 Co. 52. Hutt. 135. 3 Bac. 182. But if he
did not know it to be bad? 1 Com. 166. 1 Roll. 90. 2 it. 5.
3 Bd. 166. Implied warranty that provisions sold are good
1 Foul. 110.

For mischief done by a dog or biting, if addicted
to such mischief. Owner liable having notice, not with-
out such notice. Bro. 6. 350. 1 Com. 208. Indgt^r arrested if
notice is not alleged. Sal. 662. 3 it. 12. Luten. 90. Esp. 601. 2

For injuries done by animals fera natura or beasts, with^t

notice, owner liable (2^a. Ray. 606. 1 Com. 208. Cro. Car. 254. Ray.
109. tho the injury be diff^t as to the object from owner had
notice of. Stra. 1264. Dal. 662. Scintilla not traversable.
"Scintilla" not being a direct allegation on the ground of neg-
ligence 1 Com. 208.

If A, timber floats on B's prop^t B has care.
mult. 2 H. Bl. 251. Esp. 639, &c.

A lies for a disturbance, i.e.
hindering one from the free enjoyment of his right of some
kind generally an incorporeal right. 3 Bl. 236. 41. 1 Com.
199. 9 Co. 112. 3 Lev. 266. Cro. E. 845. 1 Vent. 275. 2 ib. 186. 2 Rol.
104. b. q. Ex obstructing a right of way - directing a water
course &c. Stra. 5. 638.

For an escape either on mesne or final.
p. vcep this act lies ag^t the shff. 2 Bac. 245. 1 Show. 176.
alt. b. l. the only action ag^t shff. in which can was Trop.
on the car (it.) Now by stat. West. 2. 2 Rich. 2^d. Debt
lies for an escape on final receipt. - But case still lies in
both instances. Esp. 609. Cro. E. 17. Stra. 873. Where Debt is
brot the Jury can't give less than the whole p. ag^t 2 Bl. R.
104. 8. Aliter in car Esp. 609. 10 2 T. Rep. 126.

When the p. vcep
under which an is arrested is void no act for escape lies
ag^t shff. - Liens if erroneous only. Esp. 608. 9. Dal. 273. Cro.
E. 138. 576. Benth. 148. Esp. 659.

For nonparance of Dep^t shff
himself only liable for misparance & tort. both he & Dep^t.
liable. Ex. V. l. escape, on lying or writ. Esp. 603. Cro. E. 175.
Dal. 18. Doug. 40. Cowp. 403. 2 Mod. 32.

If a shff having arrested

one on *rescuer* process, refuses to take suff^t bail, when understood
he is liable in *bond* but not in *Tresp.* - not a *trespas* at all.
The abuse of the authority of the law brings *negation*. *bro. C.* 140.
146. 96. *Sta.* 23. 6. 1 *Bac.* 206. *Sta.* 6. 2 *Wils.* 213. 2 *Mod.* 31. 86.
146.⁴ 1 *Leon.* 189. 1 *Com.* 489. 5 *it.* 582. 2 *Roll.* 561. 2.

This action

also ag^t *rescuers* of one taken on *rescuer* process, in favour of
the *right*. *Puff.* *Bul.* 62. 6 *Mod.* 211. *Inst.* 311. 8 *T. Rep.* 127. 1 *Com.*
204. *bro. S.* 219. 86. *Esp.* 657. 10. *bro. (C.)* 77. *Hot.* 180. "Tresp. viti"
I may give the whole debt &c or less. - *Expenditure* upon
the *right*. *Def.* insolvent or out of reach. *Bul.* 62. *Esp.* 657.

So it lies for *rescue* of one taken by *final* process, in favour
of *right*. *Puff.* *Esp.* 610. *bro. C.* 77. 109. *Stutt.* 98. 5 *Com.* 438.
proceeding ag^t *rescuers* discharges *Shff* according to *Esp.*
610. So in this case in favour of *Shff*. *Stutt.* 94. 5 *Bac.* 399

It lies for *Shff* ag^t a person escaping either on *rescuer* or *final* pro-
cess that the *Shff* himself has not been sued. *Esp.* 612. 3. *bro.*
E. 53. So ag^t *Def.* in favour of *Shff*. *resc.* *Esp.* 613. but not in
favour of the party unless the escape be voluntary. *bro. E.* 53.

But the *Shff* cannot maintain the action ag^t the party es-
caping even tho *Shff* has recovered ag^t him. for he is not li-
able to *Shff* by law but on his *covert*. *Esp.* 613. *bro. E.* 344. The *inj.*
is to *Shff* & Party, not to *Def.*

Shff liable to this action for *neg-*
lect or *misconduct* - *injuring* their clients. *Esp.* 617. 2 *Wils.* 325.
Bur. 2060. *Gal.* 86.

Shff sometimes, liable too, to *advers. party*

for dishonest practices. Esp. 618. Ex. cttt⁴. Knowingly took Indgt⁵
ag⁵ Dep⁵, after the right had been non, nos? - Dep⁵ has
been ag⁵ the All⁴ Cttt. 125. 3 Wils. 377. 3 Bl. 165. 1 Mod 209.

It lies ag³ Justices of Peace for refusing to do their duty.
Ex. denying bail. refusing to authenticate instruments
which require his signature, as writs Dispositions &c. Esp. 618.
Lyon. 323. 1 Hawk 90 1 Dal. 97.

It lies not ag⁵ a person who has
sued out a writ, for not countermanding it on settlement,
unless malice is proved. 1 B & P. 388. 2 Wils. 302. No legal duty

It lies for a breach of trust in Bailies Esp. 618. L^d Ray. 909.

This action lies on the ground of negligence in all cases of Bai-
lies. When the prop^{ty} is injured for the want of that degree of
care which according to the nature of Bailment the law re-
quires or which is expressly stipulated for. 1 Com. 208. 9 L Co.
83. Sal. 26. Com. R. 133. L^d Ray. 909. Esp. 618.

It lies ag⁵ owners
of a vessel for goods lost or injured thro negligence. Esp.
623. Sal. 440. But the owners if sued must all be joined
it is o^p. as the right of actⁿ is quasi contractive. 3 Sal. 203. 5 T
Rep. 651. com & that the case in Sal. 440. was treated as an action
on bond. But if one is sued alone he must plead it in abate!
Esp. 623. Com. 2611. 3 Sal. 203. 440. com.

Postmaster not liable for
letters lost or notes in them. lost thro the fault of the subordinate
officers. Esp. 624. Sal. 17. Com. 754. The officer is for intelligence
not insurance no cont^t no law binds him by the P^off - But

for actual fault of his own P. Mast. is liable. So are the under
offrs. Boup. 760. arg. L^d Mansfield. 3 Wils. 243.

Innkeepers lia-
ble for all property of their guests lost for want of that degree
of care the law requires of them. 5 Bona. 179. Palmer. 370. 2 Rol.
325. Bul. 73. 860. 32. 1 Com. 210. Esp. 626. 3 Bl. 165. 6. Dy. 266.
Pop. 178. Jones 13. not liable for goods stolen by guests sent
or companions or taken by public carriers. Vid^t Bail. &
Inns. & Innkeepers."

The action lies for deceit in sales - as false
warranty or a false affirmation. Esp. 629. Ex. Affirming
wrt to be more than it was. Sal. 211. Warranting goods of
such a value &c. 1 Com. 166. 7. 1 Roll. 90. Yeld. 20. Esp. 629.
Bro. J. 4. Qu. as to fraud in the sale of real estate. 2 Ray 128
Co. Lit. 384^a m. 1 Fent. 366. 2 Com. 193. Comin. Tit. 38. 65. 5.

Does not lie ag^t a vendor for false affirmation when vendor
has been guilty of neglect - as vendor might have easily
learned the true value &c. Ex. Vendor affirming that L^d
would give \$100. So if the defects are visible, a gen^l war-
ranty extends not to them. Esp. 629. 0. L^d Ray. 1188. Finch
289. 1 Fent. 110. 1 Sal. 24. Qu. Will not a spec^l warranty
subject in this case? 1 Com. 170. 3 Bl. 165. Gen^l warranty of
a horse holden good after verdict tho he had but one eye
Sal. 211. So it lies for artfully disguising known defects.
Esp. 632. 2 Roll. Rep. 5.

So when vendor practices fraud by
a false affirmation as to his title to the goods sold. Scinner
in this case said to be necessary - i.e. when fraud is the gist.
Scinner however all in pleading. Bul. 30. for the case. Esp. 632.

1 Conn. 171. All. 91. Barth. 90. 3 T. Rep. 57. 1 Kent. 109. 373. Geo. 2474
1 How. 638. Sal. 210. Ray. 593. Bul. 30.

So it lies for injuries
occasioned by any false affidavit made to defend, tho the
person making it has no interest in the fraud. 3 T. R. 157.
1 Conn. 167.

So for injuries done by creating a false pretence.
Ex. false dice - perverting to. Esp. 633. Mod. 583. Geo. 6. 90.
1 Lee. 258. Bul. 32.

If I by a wrongful act make an inno-
cent person liable over to a 3^d I am liable to the former.
Ex. I chase A's cattle on B's land & thus subject A to
damages. - I am liable to him for the fraud. Rob. P. 6.
525. Geo. 6. 325. 1 Roll 100. Barth. 34. Al. 3. 2 Geo. 282.

When a public right is obstructed or violated to the injury of an
individual he maintain the act. Esp. 600. But he must
state & show special damage. Ex. Puff as inhabitant of a
certain place had a right to pass a ferry toll free. For
reason refused to carry him. - He broke the action stating
the common right - but not laying special damage. Act
lay not. Sal. 12. 5 Co. 72. 3 Barth. 193. As of a public nuisance
occasioning private damage.

So it lies for an injury recd.
from a nuisance in gen^l. Ex. obstructing ancient rights.
9 Co. 58. 3 M. 126. 1 Kent. 239. But said that it must
have stood time immemorial. Poph. 170. Geo. 6. 118. Sal. 459.
6 Mod. 116. Willnot Inst. Chole 207th suff^l - perhaps 22 Esp.
636. Presumpt^l of a g^l. 2 Lams. 175th m. 1 B. & P. 209.

If a man having built a house on his own land, sells it, nei-
ther he nor any person claiming under him may erect any
building which will stop its light. - An injury in derogation
of his own grant. Esp. 636. 1 Sw. 122. 1 Cam. 214. 1 Kent. 237. 9.
tho the first is not ancient. But obstructing prospect is not
actionable. 3 Bl. 217. 9 Co. 58. Esp. 636. Matter of pleasure only.

A house built near a street is on the H. side immediately entitled
to the privilege of an ancient right of way, viz. Esp. 636. Ex.
c. 12. l. 11. for raising the street so as to obstruct the windows.
3 Wils. 461. 2 Bl. Rep. 924. Builder not foolish. &c. in this case
as when he builds by another's land.

One recovery of damages
for a nuisance is no bar to another (ac^{ty} agⁿ) Esp. 637. Bro. 6. 19. 2.
Leon. 103. Every continuance of it is a new wrong. - The author
of a nuisance does not discharge himself, by leasing or assigning
from act^{ty} for injuries occurring after leasing &c. Sal. 460. Bro. 373.
Esp. 637. c. 12. l. 11. also l. 12. assigner or lessee when the contin-
uance occasions a new nuisance, Esp. 637. Dr. 252. Sices
where the whole injury is done by the first action. -

For obstruc-
ting light action lies both in favour of lessee for years & reversioner.
for it is an injury both to the present enjoyment
& inheritance. Esp. 637. 4 Bur. 2141. Bro. C. 325. 237.

So this
action lies for overhanging Piff's house or land, so as to cast
water upon it. 3 Bl. 216. F. A. B. 184. 1 Rol. 157. 1 Cam. 263.
So for erecting a spout &c. Stra. 634. A manufactory &c. the va-
pours of which injure Piff's health, habitation &c. Esp. 638. 1 Rol.
89. Bro. C. 171. 3 Bl. 217. as a dwelling house. So for infecting

the air about any house in any way so as to make it unhealthful
Esp. 637. 960. 59. 1 Com. 214. 2 Roll. 141.

Injuries affecting others
or standing in the relation to others of Husb^d, parent, child
Master have been treated of. "Dom. Rel." Esp 644. 5. 6. Husb^d
Bul. 78. Cro. Jac. 511. 38. Parent - 3 Wils. 18. 3 Burr. 1870. 2 T. Rep.
186. Lakay. 1032. Master - 2 Linn. 169. 2 Linn 68. F. St. 13.
390. Cowp. 54. 2 Bl. Rep. 387. 3 Burr. 1345.

The acts bro't in
these cases have been in some respects, but they are substan-
tially actions on the case. Esp 640. 2 T. Rep. 167. Sal. 206.
Cow. 1032.

For other pers^{on} injuries - If a legal voter tenders
a vote, & the returning officer refuses to accept it, he is
liable ag^t him Esp. 647. Sal. 19. 3 B. 17. at 6. 2.

So a candidate
for an elective office may have this action ag^t the returning
off^{icer} if the latter refuses to take or count his vote. Esp. 646.
2 Vent. 25. 1 Wm. 286. 2 Linn 50. 3 Hilt. 26. 32. So returning-
off^{icer} is liable to this action in favour of the candidate for
making a false return of the votes at an election. 1 Co. 49.
This is an rule of 6. 2.

But holden that it lies not for a false
return of members of Parliament if the right is not deter-
mined in Parliamt. in favour of 2^d off^{icer}, or cannot be determined
as in case of dissolution. Sal. 532. 3 Mod. 259. Linn 1 Wils.
137. 2 W. Esp. 647. 2 W. 275. This is an rule of 6. 2.
It lies on this subject in being giving double damages & costs of
s^{uit}.

So it lies ag^t an officer for making a false return to

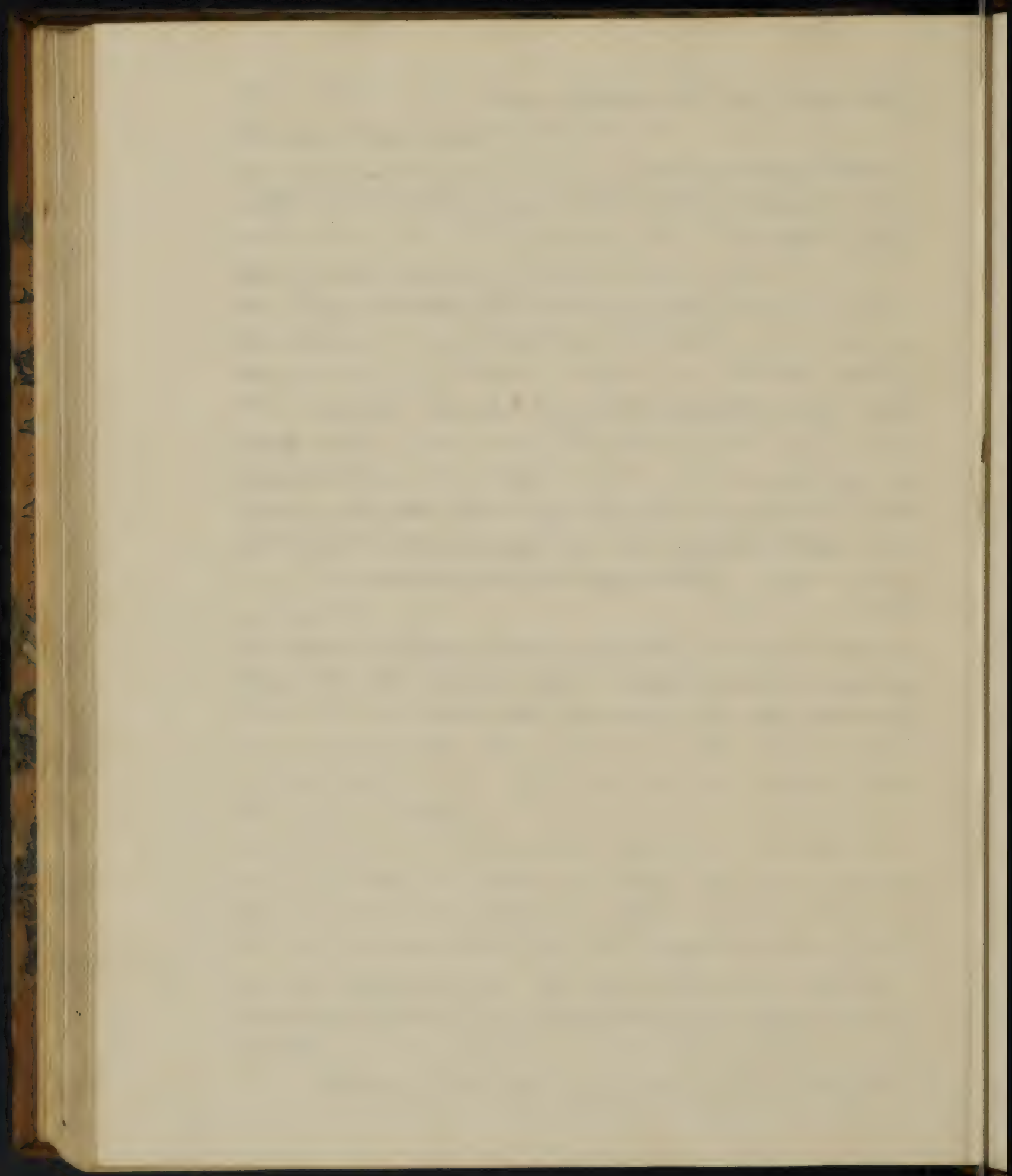
c. Handamus. Esp. 648. Bul 102. 3 Bl. 111.

So at C. L. i.e. without it
on this subject an author may maintain their action agt
such as print his works i.e. publish without his permission
4 Burr. 2363.

Any person employing another is answerable
for his misconduct or neglect in doing the business; & is then
liable in this action. i.e. when the injury is reasonable
by law. otherwise he is liable in trespass or any act adapted
to the injury. Esp. 600. 1 Kay. 739. Sal. 441. 1883.

It lies
for obstructing, process &c. if an offr. is prevented by a stranger
from executing, process, as by removing the goods of the
right. Deft or locking the right. Deft's doors. Case lies for the
offr. or Plff in the process. 6 W. 8. 908. 56. 93. a

In declaring
in case, no precise form of words necessary - as there is in
specific or framed actions. 4 Alb. R. 193. 1 T. Rep. 521. arg.
As to the action, see good note "Dorm Rel."



Trove.

This action of trover lies in cases (it was originally) when one found goods &c. & refused to deliver upon demand - but converted them. Hence called Trover & Conversion (3 Bl. 152. 5 Bac. 256) Hence averment by finding. It now lies in many other cases.

- Action derived from the H. Mortm. 2. 13 Ed. 1.
3 Revers. H. E. L. 58. de. 2 ib. 202. 3. 39. 243. 391.

It now lies against one who tortiously takes the goods of another; by fiction. 5 Bac. 257. Cro. E. 824. Cro. J. 50. Esp. 589. 1 Mod. 31. Stra. 128.

And in all cases in which one appropriates by any means of another's goods, sells, destroys or uses them without consent or right; or wrongfully refuses to restore them on demand. 2 Bl. 153. Bull. 33. Cro. E. 781. 5 Bac. 256. 7.

The first instances of this action in its present form was in the reign of Ed. 6. But actions of a similar nature had been brought in the reign of Hen. 8. & Revers. E. L. 526. 385.

The fact of finding is now immaterial. Conversion is the gist. finding gen. 4. states in Eng. but not always. Esp. 587. Bull. 33. 5 Bac. 275. 2 Bulls. 313. - Manner of obtaining, helps but inducement - finding not traversable.

It has subsisted since issue by the less certainty required in describing & finding from wagers of law. 3 Bl. 153. Gen. definition of conversion "a wrongful assuming to dispose of the goods of another as tho they were one's own." 5 Bac. 257. 6 Mod. 212. 2 Bulls. 280. 1 Sid. 264

The definition by fiction always supposes, possession lawfully gained.
But the action lies as well when the prop^r was tortious. 5 Bac.
256.7. Cov. 950. 1 Barn. 311 as when lawful; the gist being
conversion: either may consist either first in an unlawful
taking 2^d In an unlawful user. 3^d In an unlawful
detainment. The evidence of conversion in these cases is diff^r.
There must be a misfeasance to constitute conversion. Esp. 590.
5 Bac. 257. 268.9. Sal. 655. 1 Roll. 6.

1st A tortious taking is
itself a conversion law. Esp. 689. 5 Bac. 257. 1 Sid. 264. 2 T. Rep.
465. & demand not any thing of the kind necessary.
Esp. 580. 3 M. & C. 146. Tresp. is concurrent. Barn. 256.7. Sta. 943.

2^d By an unlawful user - This supposes, prop^r lawful. Ex
Using a thing found, bailed &c. &c. 5 Bac. 257. 1 Com. 221. Cov.
6. 219. This is "an assuming to dispose of the goods of an-
other as if they were our own". When the taking is not tor-
tious there must be some evidence of an actual conversion
as in the last & following Ex. Esp. 580. Misusing a thing en-
trusted to one's own care or found &c. is an unlawful user
& a conversion. 1 Com. 221. Ex. a carrier of a box of goods
breaks it open or sells it. 2 Sal. 265. 2 Bull. 212. 2 T. R. 953.
So throwing paper found into the water. Cov. 6. 219. 3 Bl. 153.

If Bailor of goods destroys them Tresp. it is 0^d is concurrent with T^{or}.
usu. Co. Lit. 57. a. 5 Co. 13. 2 Roll. 555. 5 Com. 581. Mod. 248. Bailment
extinguished - Drawing liquid out of a cask of wine & filling it with
water is a conversion of the whole. Esp. 581. 1 Com. 221. Sta. 576.
assuming &c.

Not negligent custody of a thing is not unlawful

user. Esp. 580.1. 90. Not a misfraganer (sup.) Hob. 251. 860. 146.
As no conversion. Ex. Finder of cloth suffers it to be moth eaten
So if perishable articles are suffered to be spoiled for want of
care. Bro. E. 219. Ray. 909. 1 Bac. 48. Pow. 6. 252. Lons. 48. Ray?
417. 5 Bac. 258. Hob. 17. Sal. 658. 143. 1 Roll. 2. 665. Bur. 2827.
1 Bac. 243. 5 Bac. 269. Special action in the case lies in the
case of finder Esp. 590. Ray. 917. Pow. 6. 252. Lons. 48. Wag?
barn. Lamer Sal. 655. If carrying down the goods Taver lies
not. Sal. 143. 655. &c. &c.

If the unlawful use consists in selling
the prop^y. Indeb. asspt. covenant to recover the money sold
for Bul. 131. Cowp. 419. 2 T. Rep. 144. 36. 387. 6 ib. 697.

3 Unlawful Detainer - is a conversion as if the Def^t wrong
fully refused to deliver on demand - if indeed there has been an
actual conversion as by using, selling, destroying &c. on demand
& refusal are not necessary to the right of action tho the prop^y
replevin was lawful. Esp. Dig. 589. 90. 1 Sid. 264.

But a refusal
to deliver on demand is not itself a conversion or unlawful
detainer - for it may be justifiable. Ex. not suff^t evidence
of ownership accompanying the demand. Esp. 590. 2 Bul. 312.
Cowp. 529. So Def^t may have had a lien upon the property if
comm^o carina &c. 2 Show. 161. Ray. 752. Esp. 582. 2 Bur. 956.
2221. So it might have been destroyed by no fault of Def^t
or lost or stolen. Sal. 655. Esp. 590. Bur. 2827.

A demand & refusal
thereupon are only evidence of an unlawful detainer or conversion Esp.
590. 1 Roll 131. 303. 153. 2 Show. 172. Hob. 137. & only presum^e in
evidence. 10 Co. 366. Co. 5. 97. 495. Hardr. 28. Burr 1243.

A finder of goods has no lien on them for his expense & trouble
2 H. Bl. 254. 2 Bl. Rep. 1117. Cant justify a detainer.

Someone having
goods of another puts them into the hands of a third person
against the command of the owner, this is conversion. (Esp. 581
4 T. Rep. 260. Lusk is liable for a conversion by himself tho'
to the use of his master done by his master's order. (Esp. 580. 6
1 Wils. 328. Sta. 813. 1 Com. 221. Buls. 47. 2 Mod. 442.

As timber
bring on B's land - A asked liberty to take it. - B refused - B was not
holding guilty of conversion - no intromedding - no misfeasance
5 Bac 174. 8. 229. 59. 2 Buls. 310. 2 Mod. 245. 2 H. Bl. 257. 8.

If goods are sent by A to B. not to visit in B. but to answer an-
other purpose for which cannot be answered - A may recover
for them after demand. 5 T. Rep. 215. 295.

Suppose A finds the
goods of B. believes them - sees A on refusal to deliver & recovers
the value - B then sees & proves his property - can B recover?
see moot question. Analogy to case of administration repeated
1c. 3 T. Rep. 125. 2 Bac. 11. 1 H. Bl. 669. 82 arg. 4 Dall. 54.

It is not necessary for Plff to have the absolute ownership of
the thing. Ex Bailor may maintain the action a 3^d person
be having the genl. property. 5 Bac. 261. 2 Roll. 569. 1 Sid. 438.
Latet. 214.

Ex bailor having special property may perhaps in
all cases maintain the action against a stranger. 1 Bos. 214. 2 Bea.
40. 3 Esp. 149. 1 Com. 2218. 1 Roll. 4. 1. 52. a common carrier.
cc. 5 Bac. 165. 262. 2 Mod. 525. 1 L. 143. Esp. 577. 1 Mod. 31.

So a Sheriff who has taken goods in Ex^{te} may maintain it. 1 Ld.
282. But. 33. 2 Ld. 47. n

So upon for years of a house thrown
down may have it ag^t a stranger for the timber. But. 33. Esp.
577. Sped. prop^y

So prop^y alone gives a right to maintain the
action ag^t all the world but the owner. Ex^{te} when one finds
goods. Esp. 575. 1 Com. 219. Sta. 505. 777. But. 33. This gives him a
kind of property which will support the action ag^t third
persons. Geo. E. 819. 2 Ld. 47. a. n. 5 Co. 24. b. 3 Wils. 338. But
the prop^y must be acquired legally or under claim & colour of
right for if gained without colour of right it gives no sped.
property even ag^t strangers. 3 Wils. 338. 2 Ld. 47. a. n.

So right
of prop^y is suff^d as when Deft. having goods of J. S. was obligated
to deliver them to Plff. J. S. creditor - action lay. Esp. 576. 1 Wils.
68. 1 Com. 219. 1 Bac. 242. 1 T. Rep. 480. 7 id. 9. 1 Roll. 606. The
Plff. never had prop^y. 2 Ld. 47. n.

But a property of some kind
is necessary for when Plff. had sent an order for goods to be delivered
to his serv^t & the tradesman delivered them to serv^t. That no ac^t
lay ag^t the Host. in favour of the purchaser - for no prop^y vested
in purchaser for want of delivery. Secus if they had been delivered
to the serv^t. But. 36. Salt. 18. 3 T. W. 186. Esp. 576

An unidentifica
ted Banker may maintain it ag^t a stranger. B. & P. 44.
Pea. 140. 3 Esp. R. 140. Cowp. 569.

Qlun. Ex^{te} could not maintain
the action for conversion &c. in Postator's life time. Now having
by Ex^{te} of H. & Ex. 3. de asportatis. 2 Bac. 439. Esp. 576. 80. 1 Com. 219.

600. 377. Sta. 60. 2 ed. 168. It holds that conversion of conversion in Intestate's lifetime is sufficient by proof of taking in his life time & using afterwards - for the time of using being in the knowledge of deft. - what then? 1 Com. 221. Esp. 58. Sta. 60. Was not the taking tortious? Esp. 579. 1 Kent. 260. The court considers the conversion complete in Intestate's lifetime.

Bailor's right is said to be founded on his own liability to Bailor. i.e. if so at all. on the possibility of his being liable himself & this always exists. 1 Bac. 213. 40. 5 ib. 164. 5. 262. Co. 69. 22. 89. 12. Co. 69. 89. 1. 438. Special property. Doubled in case of Deposition. 3 Bac. 165. pl. 22. Is not the special prop^{ty} which he has suff^{er}? Besides he may be liable. - No bailor liable in all events. - Policy.

If an deliv^{er} to at the govt of A. S. the bailor by delivering them back to bailor or converts himself from A. S. claim & such deliv^{er} is effectual to bar an action. 1 Roll. 607. 6. Pl. 137. Suppose deft. knowing the prop^{ty} to be A. S. has refused to deliver it to him - is not this evidence of unlawful detainer.

Recov^d by bailor suits bailor of his action for the justification & vice versa. 13 Co. 69. 5 Bac. 165. 263. 2 Rol. 569. Commencing the action attaches a right of recovery but either may have an action for his special damages. R. S. 95. Analogous to appeal of robbery by Master or Servant - he who begins first &c. 3 Bac. 559.

Bailor by suing wrong does discharge bailor - he elects his remedy R. S. 95. If bailor sues first he makes himself liable to bailor.

Saunders, 13 Co. 69. that he who has the special prop^y shall have
perhaps or this action ag^t him who has the gen^l prop^y. 7 D.
Rep. 12. 2w. R. L. 199. Conn. That Bailor may have special actⁿ
on the case to recover special damages. 5 Bac. 185. 266. Why
Tresp. or Trov. ag^t Bailor? The action is not for the loss of prop^y
but of the use of it - of the special interest - the value of the
property is not *per se* prima facie for the rule of damages.

Returning the goods to D^f after Conversion does not cut his
right of recovery - Mitigates damages only. Es. 581. 5 Bac.
266. 6 Mod. 212. Civ. S. 148. 1 Conn. 221. Roll. 56. 40. 2 Bl.
R. 902. 6 D. Rep. 696. But when the conversion consists in
a tortious taking - if D^f delivers it on demand, no
damages for the taking - that is waived in this action
Burr. 31.

The owner in Trov. vests the property converted in D^f
except when it has been returned. Esp. 593. 14 How. 146.
Hia. 1076. 5 Bac. 257.

A former receipt ag^t a stranger
is a good bar to the action. Esp. 593. Geo. S. 273. Duncan
in but no recovery. Hia. 1075.

So a receipt in indet. D^f
the prop^y having been sold is a bar. 5 Bac. 280. 2^d Ray. 1417.
So in Trespas when converted. Esp. 593.

Against whom - Wrongful Taker - Bailor - Finder &c.
So Serv^t.

Gen^l Rule. The owner of prop^y may in Eng^l maintain
tortious - not only ag^t first but any subsequent holder
even when a bona fide purchaser. Hia. 1187. Es. Bailor or

Finder sells the goods. 1 Wils. 8. Esp. 579. Sal. 283. 1 Ghos. 158
1 Bac. 237. 5 ib. 260. 6. provided the sale was not in
market overt - or if thim by covin. 2 Osb. 450.

Except

to gent^l m^l: auto (so far as relates to others than first takers)
in case of money & bills of exchange - Drawn for these can
be broke only ag^t first takers by reason of currency. when
they have been paid over to a 3^d person a bona fide pur-
chaser - reason of policy. (Bar 452. 7. Sal. 126. 1 Ray 738
Case in Barn of a bank note stolen & p^d away for val card.
Esp. 580. 39. 3 Barn. 151 b. 1 Bl. Rep. 485. Long. 611. R. L. 257.

For what? personal chattels in gent^l,

5th action

lies for them in action of any kind the only manner of property &
state need not be alleged. Esp. 588. Geo. 6. 190. 262. Geo. 2. 657. Geo. 8. 723.
Com. 219. Lalk 130. 283. 652. 1 Roll. 5 l. 20. 1 Root. 125. Cowp 117.
Esp. 543. 2^d Rep. 708. So for title and of mod

It lies not in

gent^l for an animal ferae naturae. But if confined (Lew. 2. 36.
235. Tho for such reclaimed animals it does lie in gent^l.
1 Com. 219. 1 Rob. 5. 5 Bac. 263. Fity. 86. Hob 253. Geo. 8. 125. It lies
for tame animals. as dogs. Hob. 203. So in some cases the
not reclaimed bring merchandise & val. E. Monkey. Par.
not do. Geo. 2. 262. 5 Bac. 264. 1 Com. 219. It does not lie
for a negro Slave in Eng^l or Count^l 5 Bac 263. Ray. 46. Gantt.
347. Lalk 1274. 3 Lev. 330. 2 ib. 291. com. 3 Rob. 55.

It lies not for

invasion of a record - not private property - public office
It does not lie for copy of record. 5 Bac. 264. Gantt. 111. Esp. 542

It has been holden that it lies not for money in l^y in a bag^t that it might be identified as in *Dutton*. *Geo. E. 638. 61.* In late cases holden, that as the object is not to recover in specie but damages only, it does lie for money not thus circumstanced. *5 Bac. 244. 1 Com. 219. 1 Rol. 56. 15. 10 Co. 300. 89 Geo E. 818. 41.*

If from covert loss ^{husb^d} money at play time lies by the husband. *5 Bac. 264. 1 Sid. 122. Bul. 33.*

Whungoodsan pawned pawnor may maintain Trov. after tender of the money. *5 Bac. 264. Geo. 2 244. Esp. 599. Bul. 72. 4 Co. 83. Ray. 916. 1 Com. 258. 1 H. 220. Sal. 522.* If he would on an usury contract pawnor cannot maintain Trov till he has tendered the money advanced & interest paid. *1 T. Rep. 153.* The action being not to enforce but to be relieved ag^t the contract. Trov. an equitable action.

A parol gift of goods without some act of delivery does not transfer the property & the act will lie in such case ag^t donee, he having taken possⁿ. *Esp. 577. 1 Bac. 239. 2 Leon. 30.* In without demand? is not the gift by parol be a license? But delivering the keys of the room where the goods are kept to donee is suff^t. *Sta. 955. 1 East. 192.*

Our Tint. in Com^o or Joint Tint. of a chattel can't maintain this action ag^t his companion - advantage taken of it an "not guilty" *Exp. 586. Sal. 290. 1 Bay. 301. Cowp. 259. 5. 5 Bac. 280. 1 T. Rep. 658.* *propⁿ* of same - seems if it be destroyed *Exp. 586. Co. Lit. 200. 1 East. 363. 8. Bul. 349.* If broken or only ag^t a stranger. *plea in abate Sal. 290. 2. 11. 133. Cro. E. 522. Esp. 211. Litt. 3. 323. Sal. 2. Sta. 320. Cowp. 250.*

The action lying for conversion of a personal property, only receiving a thing from another, freehold is not a conversion 5 Bac. 257. as taking a door from its place & carrying it away. Cro. J. 129. But if the avowment is "prop^r as of his own goods" conversion presumed. Cro. J. 129. after verdict. But tortiously taking a thing already severed is a conversion. 10 Mod. 125. 5 Bac. 257.

Throwing goods overboard to save a ship - no conversion 5 Bac. 258. 2 Bul. 280. Decl^r must state a place or it is ill in substance. Esp. 588. Cro. E. 78. In 2 T. Rep. 30. R. 4. 219.

Declaration in Trover ought to show prop^r in Plff. but stating prop^r as of L^r own goods is suff^t. Moore. 691. Hard. 111. 1 Com. 222. 5 Bac. 271. See also 2 Linn. 379. Stra. 1023. not necessary to state demand & refusal.

Time of conversion must be averred - In one case for amission. Indgt^r was arrested. Esp. 588. 1 Vent. 135. Cro. J. 238. 1 Com. 224. Cro. E. 97. When the time of conversion was laid before the jury the "afterwards converted" holden suff^t & the "seil." word. In as to the arrest of Indgt^r 3 Bl. 394. South. 389. Cro. J. 428. 5 Bac. 316.

The thing must be described with convenient certainty - Olin., with great accuracy "divers books" insuff^t 1 Vent. 114. 317. 1 Linn. 301. Esp. 5. 87. 8. Ray. 588. 2 Linn. 176. Ray. 991. Bul. 37. Stra. 509. As to the necessity of alleging the value of the goods - 5 Bac. 275. Cro. J. 130. 2 P. & Price & value. Fity. & B. 88. not necessary according to Esp. 588. 407. Cro. J. 118. 2 Linn. 430.

Said then an

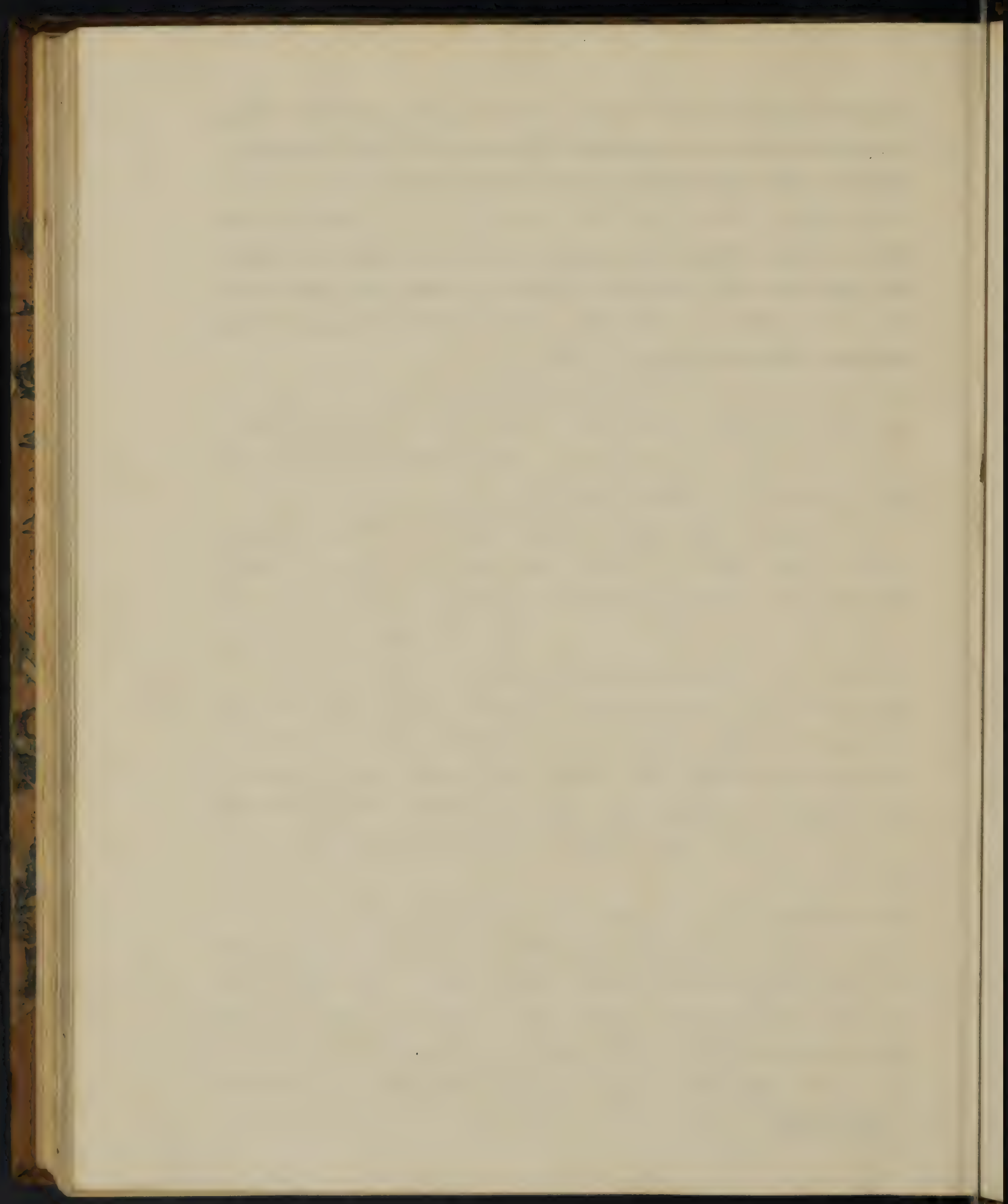
only two good plots in Dixon - Cont. issue & Release. Esp. 592.

1 Feb. 305. 5 Dec. 276. Many have been allowed. Yolo. 198.

1 Show. 146. Co. 24. 73. Sta. 60. 1078. Sal. 652.

But a just

action may be given in evidence under the genl. issue
Esp. 593. But. 48. practice in Cont. - H. of Limitations in
Cont. does not run agt. Dixon even when concurrent with
traps. Sept. 6th. See -



Replevin.

In Eng^d Replevin is a writ to the owner by legal process, of cattle or goods distrained 2 Bac. 372. Esp. 346. Co. Lit. 145 for any cause or security given to try the right the motion of Judge to give him.

Distrain is the taking of a person or chattel out of the possession of the wrong doer into the custody of the party injured to produce satisfaction for the wrong committed - It is the act of a party injured. 3 Bl. 6. Sometimes signifies the thing taken by distress.

Replevin lies not for goods taken by a mere trespassing act. 2 Le. 43. Bul 53. 3 Bl. 140. post. Writ is not granted but upon security given by P^lff to try the right of the distrainer &c in Eng^d & to restore the property if Judge is for distrainer. 3 Bl. 13. 147. Co. L. 145. Esp. 347. 8. If P^lff in Replevin does not try the right, i. e. does not pursue his action or fails in it, the property is to be returned to distrainer who may have a writ de returno Habendo. Co. L. 145. 4 Bac. 282. 372. 3.

If being returned to distrainer he may keep it till tender of suff^t amount no longer. 3 Bl. 147. - 58. 8 Co. 157^a Esp. 377. Tender of suff^t amount before distress makes the distress tortious, if before the impounding, it makes the impounding or detainer unlawful - not the taking. 8 Co. 147^a Bul. 60. If after judgment for distrainer, it makes further detainer tortious, ut sup^r. Esp. 357. 2 Le. 40. 5 Co 76^a 2 Roll. 561. & in the last case P^lff may have return, or Return, 8 Co. 147^a sent.

When distrip is taken it is to be impounded - in animate
chattels in a pound court. animals generally in a pound
court. 3 Bl. 12. Co. Lit. 47.

When a distrip being in nature of
a pledge, it could not be sold. Distrip or C^d only kept it
as a punishment to the owner if he were stubborn. 3 Bl. 10.
13. Owen 558. Sto. have in a great measure removed
this inconvenience, especially in case of distrip for rent.
by allowing a sale in certain cases. but not in case of
cattle taken damage for rent. 3 Bl. 10. 13 4. Some other cases.
There were always some exceptions to the old rule. 3 Bl. 14. 8 Co. 41.
12 Mod. 330.

Writ of Replevin is shewn to be a matter of
right even tho writ is granted with right of distrip irrepleviable.
2 Bac. 373. Co. Lit. 145.

The principle cases in which distrip may
be taken by the Eng^l law are 1. Case of cattle damage
for rent. 2 For non pay^t of rent. 3 Bl. 6. 7. Co. L. 116. Esp. 364. 55
Replevin may at 6th be by writ out of 6th or by arrest.
It by plaint. Esp. 346. i.e. Shff over precept on complaint
made. So Shff may order his Bailiff by word to replevy. Esp.
347. Fek. B. 167.

In Eng^l writ of Replevin lies in all cases, suits
in which distrip is taken except when the distrip is founded on a
Capias in Withernam. This is a distrip by the owner of the orig^l
distrip, the latter being carried out of the Co. or concealed. In
which case the Diff returns that the goods were seized.
i.e. carried to a distance. to a place unknown.

It obtains when
the orig^l distrip having seized the goods on the writ of

Replevin, on a claim that they are his own, which claim is decided against him, conveys them *sc. ut supra*.

So if there is no such claim but the prop^r is converted *sc. &c.* then there can be no replevin 3 Bl. 149. F. & B. 69. 73. T. Ray 275. of the 2^d distrip till the orig^l distrip is forthcoming: when a writ de returno *sc.* is awarded & the distrip can't be found. *sci. fa.* lies ag^t the pledge in the writ of replev. 4 Bac. 382. F. & B. 172 Esp. 347. Co. bar. 322. Esp. 376. 2 Wils. 21.

II Of Replevin of cattle taken Damage Feasant.

In this case the owner of the land has his election to distrain, *limpound* the cattle, or to bring Tresp. But if he distrains & the distrip escapes his action of Tresp is gone unless the escape was without his fault. 2 Lev. 91. 2. Same rule in case cattle *str.* 4 Bac. 179. 12 Mod. 658. 63. L^d Ray. 720. Sal. 248.

At. b. l. the proceedings in Replevin were tedious - The writ must issue out of Ch. The goods *sc.* were thus long detained from the owner - By St. Mart. 52. Hen. 3. The Ch^{ff} is unbound to replevy immediately. 4 Bac. 375. 3 Bl. 147. F. & B. 68. 9. 13 Co. 31

Analogy between taking body of Debtor & *limpounding* cattle - both pledges. 2 Bac. 354. Demand not satisfied by death, nor by escape unless the party *imprisoning* is in fault - In both pledge being holder. no other remedy 5 Bac. 179. 12 Mod. 603.

The owner of cattle distrained must of necessity provide for them unless they put into pound covert. 3 Bl. 13. Co. 247.

Every writ of Replew for cattle taken damage present contains in form an assⁿ of Tresp. Gen^{ly}. however Pleff in Replew does not expect to recover damages but appears for the purpose of having def^ts damages ascertained. If however the cattle were unjustly taken, Pleff in Replew recovers his damages.

The poundkeeper has a lien upon the cattle impounded for his fees in case of settlement between the parties. *Rever* 2nd as to this right ag^t a Replew.

If cattle enter from the highway immaterial at L. S. whether the fence was good or not (2 H. Bl. 527) because it is unlawful to permit them to go at large in the highway.

For mischief done by animals from a disposition common to the species, the owner liable with out notice or knowledge, as a Bear biting - or cattle trespassing - For that committed from a disposition not common to the species owner not liable with out science. Esp. a dog biting. Esp. 501. 2nd Ray. 606. The science not traversable, i. e. by plea - but must appear true or false in evidence. 1 Rol. 4. 4 Co. 18. Geo. C. 350.

If the owner of land chase a beast damage present on the land of its owner he is not liable for chasing - *Sicis* of stranger - liable to both. Latet 120. 5 Bac. 179.

Distress not allowed to use a beast distressed - 3 Bl. 13. Geo. C. 148. He becomes a trespasser at inst

When there is a trial in Replew the Def^t may either deny the taking or show his right to take in case of damage present.

Sant. 4 Bac. 388. The quest. issue is non caput 1 Vint. 249
4 Bac. 388. Bal. 54. Upon this issue claim of prop^{ty} cannot
be given in evidence. It should be pleaded. Bal. 54. Sal. 5. 2 Geo.
92. 6 Mod. 81.

If Def^t justifies (in his own right or that of his wife)
because the beasts were damaged trespassant, he is called the avow-
rant. Esp. 360. 2 Bl. 150. 2 Saund. 195. If he justifies in an-
other right as Lord &c. this is to make cognizance. 3 Bl. 150.

Avowry is also in the nature of a plea to the replevin. The
replication is in nature of a plea to the avowry.

In this case both
parties are actors, i.e. Plffs. The owners of the cattle suing for
damages & the avowrant in Eng^d for a return of the cattle.
& in some cases damages 4 Bac. 373. 2 Mod. 149. Geo. E. 798.

That avowry is in nature of an actⁿ appears from avourants
right to recover Judg^t for the return of the distress & in
some cases damages. 4 Bac. 373. Esp. 376. 7. 2 Wils. 117. Sal.
95. 2^d Plff may plead in abatement of the avowry. 4 Bac.
373. 3^d avowrant must close with a certification. Geo. E.
530. 798. Cattle. 122. 6 Mod. 103. Plow. 263. 148.

But the
the avowry is in nature of an action, one t^{nt}. in com^{on} may
it is 2^d avow with his fellow. Geo. E. 530. 4 Bac. 373. Esp. 374
for taking cattle damage trespassant. Overruled - He must
make cognizance as Plff. of the other. W. Jones. 253. 24 Bl.
386. 1 Roll. 220. pl. 14.

Tenants in common may have several
avowries for rent, because it is in reallty. 24 Bl. 387. arg^o.

th. 340. Sel. 389. Ray. 422.

As title to land may come in question in this action, it has been called when this is the case a real action. Now holden to be pers^{on} as Prop. or debt. - For land cannot be recovered in it. 4 Bac. 373. Finch 316. Leonb. 472. b. 27.

Rule. That all distresses must be taken by day - except in case of Beasts damage payable. But they should escape. 3 Bl. 11. Esp. 360. Co. Lit. 142. b. 01.

Distress for damage payable must be made while the beasts are on the land. Esp. 360. Co. Lit. 142. q. 60. 22. Claim so with respect to distress for rent, except that it might be taken on rescous suit. Now remedied by St. 3 Bl. 11.

As to Distress for rent. Claim the L^d might take as large a distress as he pleased. Dist. had no remedy. Now has by St. 11. Canb. 52. H. 3. a special action on the case. 3 Bl. 12. 3 Lev. 28. 1 Vent. 104. (Sta. 85). (Prop. not maintainable, Burr 590.) in this case it brings no injury at C. C. except when gold or silver being of a known certain value was distrained. - In other cases a special action on the Stat. is the proper remedy.

Distress for rent is incident of com^{mon} right (according to C. C.) in those cases only in which the owner of the rent has the reversion, - not where he has no future interest. - as in case of rent charge - as when the owner of Land conveys his whole interest reserving rent. Litt. 215. 18. Co. Lit. 142. 3. Esp. 355. 6 2 Bl. 42. But he may have the right by clause of distress at C. C.

the right of distraining is by H. 4 Geo. 2 extended to all suits
2 Bl. 43. 3 id. 6. Esp. 355. 6.

In case of distress for rent by H. 4 Geo. 2
if Deft in the action of Replew prevails he recovers his costs & so
much in damages as is equal to the value of the distress.
If that is less than the rent due - But if the distress is equal
to or more than the value of the rent due, he recovers in dam-
ages the amount of the rent, & in the first case Distraintor may
have a further distress. 3 Bl. 150. 1 Bul. 58 3 T. Rep. 349. 2 H. Bl.
36. Esp. 377. 2 W. 1. 116.

D. In the case of personal property attached.
Replew in this case is more an advisory writ - Not binding
on the replew writ but on the attacht. 2 Lw. 93. Husb. 274.
It is rather a "warrantary precept," requiring the offender
to deliver the goods &c.

By this writ prop^y is restored to the own-
er on his finding security to prosecute & to answer such dam-
ages & demands & dues as the adverse party shall recover.
H. 4 Geo. 360. The security to prosecute the replew &c. is more
matter of form.

This writ founded in good policy - That the
owner need not be dispossessed of his prop^y. For a long time
on attaching is but for security, he suffers no injury. Se-
curity sufft.

Replew in some measure superseded by replev-
ing.

Magistrate taking the bond acts ministerially. He is
liable if bond is insufft. (but not if the bondsmen is impos-
sible at the time) & the action may be brot agt^t him tho no
previous writ has been brot agt^t the pledge Bul. 60.

He becomes surety in this case, surety for the whole debt, as in Eng? It is done even over the amount of the bond taken as the case among br. 1 N. Bl. 76. Comp. 71. V. N. Bl. 547. com. it. 36.

Can
in N. Bl. stronger than a similar case here - Bond in Eng? bring for a return of the goods Esp. 348. Long. 336. 4 T. R. 483. com. V. N. Bl. 547. The act is Can. Bul. 60.

Ques. doubtless whether
the action would lie - Bond in Eng? double the value of the goods. Bul. 60. V. N. Bl. 36.

Questioned whether whether when prop^y is taken to a small amount & replevied the Bondsman is liable for more than the value of the property - no decision either R's aside from the words of the stat. - But the words of the St. explicit - analogy to case of receipt, man who is always liable for the whole unless he delivers the property. Decided contra 4 T. R. 433. V. N. Bl. 547. Esp. 348. V. N. Bl. 36 &c. com.

Questioned
also whether the bondsman can discharge himself by surrendering the goods after judgment for Def^t in Replev? This question depends in some measure (i.e. so far as it is affected by the extent of his liability) upon the former - how far he is liable? Not like the case of a receiptman, he is bound only to deliver - not like bondsman in Eng^l replev. who engages only for the return of the property. - In bond^y he can't. surety.

Of the right
if one is attached for the debt &c. of another, he has not an act of Replevin - but he may have Tresp. For replevin in this case is not an adversary suit. - & no one can replevy, unless he is a party to the suit & has an interest in the goods. Hob. 246. 2 T. R. 433.

So it seems Replevin is not the proper remedy for a man dispossessing another according to the laws of Eng^d. it being grounded on a distress. Bul. 53. Co. Lit. 145. Esp. 346. 3 Pl. 13. 146. 7. 2 Lw. 89. Tw. Bull. 52.

If cattle of a Free sole is distrained & the owner. Husb^d alone may replevy. for prop^{ty}. becomes Husb^d's by intestate marriage Esp. 375. 1 Ld. 81. 2. Bul. 53. But if the wife joins it is good after verdict - for presumption will be that they were joint tenants. Ex^{or} may replevy distress taken from testator - Anthon. Supra.

If the goods of several are distrained, they cannot join in replevin, injuries being several. Co. L. 145. 6. Esp. 374. Bul. 53.

Goods distrained in a foreign country though lost here cannot be replevied here. Esp. 372. 2 Skin 91. The captain might be lawful there.

Replevin lies of things personal only not of deeds of land. Esp. 372. 4 Mac. 385. 2 Ct. B. 68.

Replevin is founded on the right (i.e. seint) of property in the poss^{or}. - Therefore it is a good plea in abatement in bar that the property is in a stranger. Esp. 351. 2. 4 Mac. 373. 2 Geo. 92. Centt 44. 243. Sal. 94.

Defect from act^{or}'s' Tresp. (Bul 53) where Pl^{ff}'s prop^{ty} is suff^{ic} for in Replevin the Def^{ect} is in prop^{ty} like dispossessed by the Replevin itself. -

